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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

TWIN CITY FIRE INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST, NEW ENGLAND INSURANCE COMPANY, AND HARTFORD INSURANCE COMPANY OF CONNECTICUT,

*Petitioners*,

—v.—

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

*Respondent*.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a state force a corporation to continue to engage in a particular business within its borders by imposing massive penalties on exit from the state, including forfeiture of property unrelated to that business owned both by the corporation and by seven separate affiliated corporations, without violating the Due Process and Takings Clauses?

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the American Insurance Association, Chubb Insurance Company of New Jersey, Federal Insurance Company, Vigilant Insurance Company, Pacific Indemnity Company, Great Northern Insurance Company, Chubb Custom Insurance Company, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Insurance Company, State Farm Life Insurance Company, and State Farm Annuity and Life Insurance Company, submitted amici curiae briefs to the New Jersey Supreme Court.

## STATEMENT PURSUANT TO RULE 29.1

Petitioner Twin City Fire Insurance Company is a corporation organized under the laws of Indiana, and is a wholly-owned subsidiary of Hartford Fire Insurance Company. ITT Hartford Group, Inc., a wholly-owned subsidiary of ITT Corporation, is the parent company of Hartford Fire Insurance Company and, derivatively through Hartford Fire, the parent of Twin City and the other affiliates that also are Petitioners in this case.

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TO THE SUPREME COURT OF NEW JERSEY

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Twin City Fire Insurance Company ("Twin City") and its affiliates Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, New England Insurance Company, and Hartford Insurance Company of Connecticut (hereinafter referred to collectively as the "Affiliated Corporations"), respectfully petition this Court for a writ of certio-

rari to review the judgment and opinion issued by the Supreme Court of New Jersey in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 609 A.2d 1248 (N.J. 1992). A-1-33.[1] The opinion of the Appellate Division of the New Jersey Superior Court is reported at 591 A.2d 1005 (N.J. Super. App. Div. 1991). A-34-56.

## JURISDICTION

The Supreme Court of New Jersey entered its judgment on July 29, 1992. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

### Fifth Amendment

The Takings Clause of the Fifth Amendment to the United States Constitution, as it is incorporated and applied to the State of New Jersey through the Fourteenth Amendment, provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

### Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of . . . liberty, or property, without due process of law. . . .

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1 Numbers following the letter "A" denote reference to the appendix to this petition.

## N.J. STAT. ANN. § 17:33B-30

This petition also involves Section 72 (N.J. STAT. ANN. § 17:33B-30 (West 1992)) of New Jersey's Fair Automobile Insurance Reform Act of 1990 ("FAIRA"). Section 72 is reproduced in the Appendix at A-57.

## STATEMENT

### A. Nature of the Case.

This case raises the novel and important question of whether a state violates the Due Process and Takings Clauses when it forces corporations to choose between surrendering the liberty to cease doing business in the state or forfeiting valuable property rights. The State of New Jersey put Petitioners to that choice when Petitioner Twin City decided to stop selling private passenger automobile insurance in the State.

While this Court has never explicitly defined a corporation's right to exit from business operations in a state, this Court's teachings in other areas demonstrate that the liberty to exit is constitutionally protected. Nevertheless, in the absence of explicit guidance from this Court, New Jersey has been able to prevent Petitioner Twin City from exercising its right to cease doing business in the State. If New Jersey's scheme to preclude exit is allowed to stand unreversed, it will be available to regulators currently facing difficult insurance problems in many states.

### B. The Statutory And Regulatory Scheme Used By Respondent To Block Twin City's Exit From New Jersey's Private Passenger Automobile Insurance Market.

Twin City sought to withdraw from New Jersey's private passenger automobile insurance market in March, 1990. At that time, Twin City was writing only one half of one percent of the private passenger automobile insurance in the New Jersey market. On March 7, 1990, Twin City began the process of a phased and orderly withdrawal by surrendering its certificate

of authority and issuing notices of nonrenewal, pursuant to applicable statutes, for policies that were to expire in sixty to ninety days. Within a week after Twin City attempted to exit, the Fair Automobile Insurance Reform Act of 1990 ("FAIRA") became law.

New Jersey officials vigorously opposed Twin City's departure. On the basis of FAIRA, Respondent rejected Twin City's relinquishment of its certificate of authority to write private passenger automobile insurance.[2] Respondent instituted a state court action to compel Twin City's compliance with Section 72 of FAIRA.[3] In response, Twin City submitted a formal plan for its orderly withdrawal from New Jersey's private passenger automobile insurance market. A-58-70. Twin City's plan included, among other things, a one-year runoff of its policies, a guarantee of Twin City's liabilities by its parent company,

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2 At the time this controversy arose, New Jersey was struggling to find a solution to a $3 billion debt arising from the failed operations of a quasi-governmental joint underwriting association ("JUA"), which the State created to provide insurance coverage for high-risk drivers who could not obtain insurance in the private market. Under FAIRA, the State imposed substantial financial assessments and surcharges on insurance companies operating in New Jersey in an effort to retire the JUA debt. N.J. STAT. ANN. § 17:30A-8(a)(9) (West 1992) (assessments); N.J. STAT. ANN. § 17:33B- 49 (West 1992) (surcharges).

3 Section 72 established a statutory withdrawal law for the first time in New Jersey. The New Jersey Supreme Court previously had recognized that an insurer has the right to surrender its license. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979). Section 72 provides in relevant part that an insurer:

> may surrender . . . one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority . . . held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. . . .

N.J. STAT. ANN. § 17:33B-30 (West 1992). A-57.

and its submission to the jurisdiction of the New Jersey Department of Insurance for continued regulatory oversight during the winding down of Twin City's insurance obligations in the private passenger automobile market. A-68.

Section 72 of FAIRA authorizes Respondent to impose conditions that may prevent insurers from exiting the State's chronically troubled private passenger automobile insurance market. On August 14, 1990, Respondent used the authority of Section 72 to issue Administrative Order No. A90-151 (the "Order"). A-71-97. The Order nominally approved Twin City's exit, but imposed conditions that forced Petitioners to make a "choice." Twin City could forfeit its right of exit and continue to write private passenger automobile insurance in the State indefinitely, or, if Twin City "chose" to withdraw from the market, Petitioners would have to surrender all of their respective authorities to write various lines of insurance in the State as the price of Twin City's exit. Among other conditions imposed on Twin City's exit, Respondent specifically required that: (1) Twin City must terminate all of its other property and casualty business in New Jersey (the "Other-Business Condition"); (2) the Affiliated Corporations (which did not seek to exit) must surrender all of their respective licenses to write property and casualty insurance, including private passenger automobile insurance (the "Forfeiture Condition")[4]; and (3) Twin City must

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4 The preponderance of the insurance business to be forfeited did not even involve private passenger automobiles. In 1991, the Affiliated Corporations' respective businesses generated the following premiums from various New Jersey insurance markets: Hartford Accident and Indemnity Company, $1,258,491; Hartford Casualty Insurance Company, $26,013,557; Hartford Fire Insurance Company, $48,454,827; Hartford Insurance Company of the Midwest, $17,344,738; Hartford Insurance Company of Connecticut, $10,960,297; Hartford Underwriters Insurance Company, $17,004,329; and New England Insurance Company, $4,372,423. In the aggregate, the Affiliated Corporations generated $192,268,583 in premiums. Of that amount, The Affiliated Corporations generated $17,692,510 in annual premiums from private passenger automobile customers, and Twin City generated annual premiums of $29,537,573 from servicing its small share of New Jersey's private passenger automobile insurance market.

expand its business in New Jersey by writing additional private passenger automobile policies for five years (the "Mandatory New-Business Condition").[5] A-93-95. The Order summarizes that: "Controls over market entry and exit are essential parts of the regulatory scheme provided by statute." A-84. The lower courts held that Respondent's actions are constitutionally permissible.

### C. The Decisions Below.

Twin City and the Affiliated Corporations filed an action in the Appellate Division of the New Jersey Superior Court, challenging the validity of Respondent's Order under the Due Process and Takings Clauses.[6] The court held that the Forfeiture and Other-Business Conditions do not violate the Takings Clause. A-43. The court reasoned that "the *choice* given appellants by Section 72 does not constitute a 'taking.' " A-39 (emphasis added). The appellate court then applied the three-part test enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and found that no taking had occurred. A-39-43.

The appellate court also rejected Petitioners' argument that the conditions of Respondent's Order violated the Due Process Clause. The court framed the due process question as

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5 Respondent has ordered that, unless Twin City places its business with another insurer acceptable to Respondent (which is virtually impossible in view of the unfavorable market conditions created in part by regulatory misfeasance and malfeasance), Twin City must not only renew all existing policies but also must absorb mandatory quotas of additional residual market business for five years. A-80-81. *See also* N.J. STAT. ANN. § 17:33B-11(c)(5). The effect of these provisions is dramatic. Twin City's private passenger policies in New Jersey more than doubled from 15,971 as of March, 1990 to 36,627 as of September, 1992. Twin City is projecting losses of some $100 million as a result of the conditions contained in the Order.

6 Petitioners also brought administrative procedural challenges to the Order, as well as other constitutional challenges under the Equal Protection Clause. The courts below rejected those challenges.

> whether Section 72 strikes a rational balance between a private passenger automobile insurer's desire to withdraw from the market and the public's need for it to remain in the market to share the burden of bailing out and depopulating the JUA and to continue to provide coverage to its policyholders and other applicants. A-45.

Under this framework concerning the due process right of exit, the court held that Section 72 did not violate the Due Process Clause. A-52.

On appeal, the New Jersey Supreme Court agreed with the intermediate appellate court's ruling that the Forfeiture and Other-Business Conditions on Twin City's exit did not violate due process. A-32. In holding that the State had a legitimate interest in obstructing Twin City's right of exit, the court noted:

> In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw—in other words, strong medicine—would be effective. If the forfeiture condition discourages withdrawal, a substantial state interest—retention of private-passenger insurers—will have been advanced. A-20.

For this reason, the court held that the Forfeiture and Other-Business Conditions did not violate principles of substantive due process.[7] *Id.*

The New Jersey Supreme Court also agreed with the intermediate appellate court that Respondent's Order did not violate the Takings Clause. The court focused its takings analysis by distinguishing cases involving physical invasions of property from the so-called regulatory takings cases. A-26-28. The court neglected to recognize, however, that this case involves a total deprivation of Petitioners' intangible property, not merely a reduction in the value of that property. The court conceded that

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7 The supreme court also applied this legitimate-state-purpose analysis in rejecting Petitioners' takings arguments. A-30.

the "economic impact [to Petitioners] is potentially quite severe. . . ." A-30. Nevertheless, the court assumed that Petitioners would not be totally deprived of their property since they could apply their resources to business in other states. A-31-32. The court then purported to apply this Court's ad hoc balancing test to hold that the Forfeiture and Other-Business Conditions of Respondent's Order did not constitute a taking, but the court misconstrued each element of the test. A-30-31. Finally, the court rejected the argument of amicus curiae, American Insurance Association, that the Order violated the doctrine of unconstitutional conditions, holding that no condition in the Order violated the Constitution. A-32.

## REASONS FOR GRANTING THE WRIT

### I.

### This Case Provides A Timely Opportunity For This Court To Advise The States That Schemes Which Force A Corporation To Choose Between Forfeiting Valuable Property Rights And Surrendering the Liberty To Cease Doing Business In A State Violate The Due Process Clause And The Takings Clause.

#### A. Overview.

One of the most critical aspects of the Federal Constitution is the delicate balance it creates between state and federal power. The free flow of commerce across the borders of the several states is a fundamental and essential tenet of the Founding Fathers' design. While Congress regulates interstate commerce, it largely deferred regulation of the business of insurance to the states by means of the McCarran-Ferguson Act. 15 U.S.C. §§ 1011 *et seq.* However, the State of New Jersey, with its legislative, executive, and judicial branches acting in concert, now has expanded the power to regulate dangerously beyond sound limits to the point at which it has become the power to destroy the business of insurance. This precedent, left

unchecked, undoubtedly will be followed by other states eager to shift the problems created by inept regulation of various troubled insurance markets (*e.g.*, automobile, health, and workers' compensation) from government to private industry through conscription of insurers' services.[8]

There is nothing in the McCarran-Ferguson Act or its legislative history to suggest that Congress intended—by deferring primary regulation of the insurance industry to the states—to strip insurance corporations of constitutional rights applicable to all other citizens. In this case, under the guise of regulating insurance, Respondent has trampled upon Petitioners' fundamental due process right to exit from an undesirable regulatory system. Unless this Court makes it clear to New Jersey and other states that federal due process includes the right of egress

8 There is already a significant trend of states attempting to blockade state borders to prevent insurer exit. Massachusetts has repeatedly attempted to block insurer exit pursuant to a statute (MASS. GEN. L. ch. 175, § 22H (1992) that permits the suspension of a withdrawing automobile insurer's licenses for all lines—as well as the licenses of the insurer's affiliates. Massachusetts's highest court has upheld use of this statute to preclude insurer exit. *See Maryland Casualty Co. v. Commissioner of Ins.*, 363 N.E.2d 1087 (Mass. 1977) (rejecting challenges based on federal due process and equal protection).

Recently, Massachusetts imposed severely punitive conditions on an attempt by Aetna Casualty and Surety Company to exit from the State. In a complaint filed in the United States District Court for the District of Massachusetts (Civ. Action No. 90-11081-MC), Aetna alleged that its attempts to withdraw from the private passenger automobile market had been burdened with unconstitutional conditions: the State threatened Aetna with forfeiture of its non-private passenger insurance licenses unless Aetna would agree to subsidize an assigned-risk pool for nearly a decade. The case was dismissed pursuant to a settlement on January 1, 1992, and thus this Court had no opportunity to review the constitutionality of Massachusetts's scheme.

California and New York also have attempted to preclude automobile insurer exit through the application of mandatory policy-renewal statutes. *See Travelers Indemnity Co. v. Gillespie*, 785 P.2d 500 (Cal. 1990); *People ex rel. Lewis v. Safeco*, 414 N.Y.S.2d 823 (N.Y. Sup. Ct. 1978). Those courts interpreted the statutes involved as not precluding exit. If the New Jersey Supreme Court opinion is allowed to stand, officials in California and New York may be emboldened to imitate New Jersey's scheme.

from regulatory oppression, the delicate balance of federal and state power envisioned by the Constitution will collapse and state balkanization of the insurance industry will ensue.[9]

## B. The Right To Decide Whether To Do Business Within A State Is Protected Under The Due Process Clause.

Respondent, through the conditions in the Order, has erected massive barriers to block Twin City's exit from a market for the express purpose of escaping insurance problems, particularly the JUA deficit, that the State allowed to develop for many years. In so doing, Respondent has impermissibly burdened Twin City's constitutionally protected liberty without due process of law. By invalidating Respondent's Order, this Court will affirm a principle that is critical to free enterprise nationwide, namely, that a state may not constitutionally prevent a corporation from leaving a market in order to conscript that entity for public service in a market mismanaged by the State.

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9 The process of balkanization already is reflected in the various state attempts to preclude insurers from exiting automobile insurance markets, *see* note 8, *supra*, or to protect their insureds from the consequences of such actions by other states. Iowa recently promulgated a provision under which the state insurance commissioner may order a domestic insurer to withdraw from any or all lines of business being sold *in another state* upon a finding that the domestic is incurring operating losses in the other state. IOWA ADMIN. CODE § 191-5.7 (1992). New Jersey's scheme of precluding exit thus runs directly counter to Iowa's law, which may require insurer exit from a state outside of Iowa. Since Twin City is projecting losses of $100 million in New Jersey over the next five years pursuant to the Mandatory New-Business Condition, it would face a "Catch 22" situation if it were an Iowa domestic. New Jersey would preclude exit while Iowa would require it.

In addition, Maine is attempting to solve problems with its workers' compensation system by imposing assessments that apply to companies even after they have withdrawn from the State. The assessments are based on the combined surpluses of a company and its affiliates, and it appears that affiliates not conducting any business in Maine would be included in the surplus assessment calculation so long as one corporation in the affiliated group was authorized to write workers' compensation insurance in Maine. In a recent litigation, the State cited the opinion of the New Jersey Supreme Court in this matter to justify imposition of the assessments. *State Farm Fire & Casualty Co. v. Superintendent of Ins.*, Civ. Action No. CV-92-83 (Me. Sup. Ct. 1992).

The New Jersey Supreme Court recognized, as it must, that Respondent's Order could pass muster under the Due Process Clause only upon a showing of a legitimate state purpose, as well as a rational connection between that purpose and the means selected to achieve it. A-16. The court erred, however, in applying this standard by embracing an illegitimate state purpose and by endorsing regulatory mechanisms that do not rationally achieve any legitimate state aim.

### 1. The Purposes Of Respondent's Scheme Of Conditions Cannot Be Deemed To Be Legitimate.

In essence, the New Jersey Supreme Court endorsed as "legitimate" state goals: (1) the forced retention of insurance companies; and (2) the involuntary servitude of insurers in a particular market that the State itself decides an insurer should continue to serve. These goals are not only illegitimate and arbitrary, they are repugnant to the economic tenets of a free society, and are properly invalidated under the Fourteenth Amendment for the following reasons.

#### a. Under Clear Supreme Court Precedent, A State May Not Compel A Corporation To Do Business.

This Court long ago rejected as unconstitutional a state's attempt to force a company to conduct business against its will. In *Frost & Frost Trucking Co. v. R.R. Commission*, 271 U.S. 583 (1926),[10] California sought to force a private carrier to

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10 This Court recently has reaffirmed under the Takings Clause that a state may not constitutionally compel an individual to do business—even where the business is highly regulated and the law provides for a fair rate of return. For example, in *Yee v. City of Escondio*, 112 S. Ct. 1522, 1528 (1992), this Court sustained the constitutionality of a rent control ordinance because the regulatory scheme did not compel petitioners to continue renting their property in perpetuity.

In his dissent from dismissal of an appeal in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878, (1983), then Justice Rehnquist observed that a state acts unconstitutionally when it precludes a property owner from removing a rent controlled unit from the market:

become a common carrier by threatening to withdraw the privilege of using the state's highways. This Court firmly rejected that effort under the Due Process Clause. A state could not constitutionally convert a private carrier to a common carrier "by mere legislative command. . . ." *Id.* at 592. Accordingly, a state could not achieve the same result by threatening the loss of a privilege. *Id.* at 592-595 and 599. California's attempt to dress up coercion as "choice" did not change the analysis:

> The act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

*Id.* at 593. *Cf. Union Pacific R.R. Co. v. Public Service Comm'n*, 218 U.S. 67, 70 (1918) (Justice Holmes remarking that "[i]t always is for the interest of the party under duress to

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> The provision in the . . . statute ensuring a fair net operating income to the landlord does not change the result that should attend this case. In previous decisions we have recognized that property ownership carries with it a bundle of rights, including the right "to possess, use and *dispose* of it." (emphasis added) (citation omitted).

Similarly, in *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992), this Court recognized that the right to travel enjoys heightened scrutiny under the Equal Protection Clause. *See also Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974). A state may not infringe upon this important right based solely on the rational basis test. This Court's protection of the right to leave/travel under various constitutional provisions underscores the importance of protecting the right that Respondent threatens to usurp in this case—the right to exit a market. *Cf. Apetheker v. Secretary of State*, 378 U.S. 500, 514 (1964) (law prohibiting issuance of passports to Communists held to be unconstitutional on its face because it violated due process right to exit the country); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel is part of the "liberty" protected by the due process clause); *Crandall v. State of Nevada*, 73 U.S. 35, 49 (1867) (tax imposed on persons exiting state by carrier violated constitutionally protected right to travel).

choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."). Likewise, Respondent in the case at bar may not indirectly force Twin City to serve a market that the State itself chooses by imposing conditions that require enormous forfeiture of property. Respondent's devious scheme to preclude exit is blatantly devoid of legitimate purpose.

In the courts below, New Jersey took the same position adopted by California and rejected by this Court in *Frost*: Respondent claimed that New Jersey's scheme was constitutional because Twin City had a choice. As *Frost* makes clear, however, New Jersey's scheme seriously violates this Court's long-standing doctrine of unconstitutional conditions, which precludes states from "impos[ing] conditions which require the relinquishment of constitutional rights." *Frost*, 271 U.S. at 593-594. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.*

New Jersey's scheme is considerably more egregious than the scheme invalidated in *Frost*. The carrier in California could have preserved its constitutional right of due process by foregoing a privilege. In New Jersey, Respondent is forcing Petitioners to surrender constitutional rights under any course of action available. If Twin City remains in New Jersey, it surrenders its liberty, guaranteed by the Due Process Clause, to choose an occupation and to move freely across state lines. If Twin City exercises its right to exit, both Twin City and the Affiliated Corporations must surrender highly valuable property rights guaranteed by the Takings Clause. *See* pages 20-25, *infra*.

In *Yee v. City of Escondio*, this Court recently indicated a particular interest in cases in which a state impairs the right to exit a market. The Court in *Yee* sustained the constitutionality of a rent control ordinance, but observed that "[a] different case would be presented were the statute, on its face or as applied,

to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 112 S. Ct. at 1528. Petitioners respectfully submit that the instant case presents this precise issue.[11] It is unquestionably an issue of national significance that is appropriate for this Court to review.

### b. The Right To Exit From A Business Is Firmly Rooted In The Legal Tradition Of This Country.

The right to "ingress and egress" recognized in the hallowed precedents of this Court has its historical roots in the inception of this Nation. Referring to European refugees, one scholar has observed that the "United States owes its very existence and growth to millions of decisions favoring exit over voice." Albert O. Hirschman, *Exit, Voice, and Loyalty* at 106 (Harvard Univ. Press 1970). Similarly, the American West was settled by pioneers who voted with their feet; the "myth" of going West

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11 New York's highest court has directly addressed the issue of compelled use of private property, and its conclusions differ fundamentally from those of the New Jersey Supreme Court in this matter. In *Seawall v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), the New York Court of Appeals invalidated a law that required owners of single-room-occupancy hotels to refurbish and lease units at controlled rents for an indefinite period.

The court found that the law effected an unjust taking, even though it contained a "buy-out" provision allowing owners to escape the requirements of the law by paying a fee of $45,000 per unit. *Id.* at 1065.

The court rejected the City's argument that the buy-out provision saved the law:

> [T]he City . . . is saying no more to the owners than that it will not do something unconstitutional if they pay the City not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a "ransom" cannot make it lawfu'

*Id.* at 1069-1070. The fact that the ıd sought to be furthered by the City law—alleviating the problems of ho ıelessness—was acknowledged by the court to be "of the greatest societal importance" did not justify the means employed to achieve it. *Id.* at 1068-1069.

"was of the greatest importance for it provided everyone with a paradigm of problem-solving." *Id.* at 107.

The principle of exit was enshrined in Article IV of the Articles of Confederation. Even though the Articles stressed the role of the individual states, which retained the right to regulate commerce, Article IV specifically provided for the right to exit:

> Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union . . . the people of each state shall have free ingress and regress to and from any other state. . . .

The right to ingress and egress has remained virtually unquestioned for more than 200 years. New Jersey itself affirmed the principle in *Sheeran v. Nationwide Mutual Insurance Co.*, 404 A.2d 625, 630 (N.J. 1979) (recognizing that an insurer has right to withdraw from automobile insurance business).

Until recently, the right of exit has represented a major structural safeguard for all of the other liberties guaranteed by the Constitution. It is a natural check on regulatory oppression; it does not require courts to look into details of legislation. When regulation is abusive, citizens may simply leave, and the implicit threat of departure promotes healthy apprehension on the part of state officials who may be contemplating abusive regulatory schemes. *See* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992).

Unfortunately, the recent actions of New Jersey, Massachusetts and other states threaten to erode the natural safeguard of exit. *See, e.g., supra* note 8. The draconian penalties imposed by New Jersey to block Twin City's exit from the State constitute an intentional assault on this venerable right. While the police power may under some circumstances encompass the right to regulate exit in order to further a legitimate state interest, exit should not be barred for the very purpose of eliminating it as a check on oppressive regulation.

The New Jersey Supreme Court acknowledged that "competition among state governments tends to prevent overregulation, offering companies choices in determining those States' regulatory systems to which it will subject its business operations." A-28-29. Nevertheless, that court endorsed a scheme of perpetual economic bondage in order to pay off the $3 billion JUA debt that New Jersey politicians allowed to accumulate over a period of many years.

### c. Punishment For Seeking To Exit A State Is Not A Legitimate State Purpose.

New Jersey officials made their coercive and punitive intent clear at the very outset of this controversy. After Twin City attempted to surrender its license, New Jersey's Governor stated in *The New York Times*: "If [Twin City] won't sell us car insurance, we won't let them sell us anything." A-102. As the Governor's statement makes clear, the conditions imposed on exit were patently intended to intimidate Twin City into changing its business decision and to cow corporations that were considering exit into remaining in New Jersey to avoid the fate of Twin City and the Affiliated Corporations.

In upholding these penalties, the New Jersey Supreme Court attempted to downplay—if not to hide—the harsh reality of the oppressive regulatory scheme it condoned. The court held that the State could constitutionally impose conditions, such as property forfeiture, as the means to "discourage" Twin City's withdrawal from the market or to "induce[ ]" other multi-line companies to remain in the market. A-20. Artful language, however, should not be allowed to obscure reality. For all the euphemisms of "discouragement" and "inducement," the New Jersey Supreme Court in fact blessed closure of the State's borders, and endorsed an *in terrorem* scheme of forced servitude in a market that the State dictated must be served.

Viewed as punishment, New Jersey's actions cannot pass constitutional muster. A bare desire "to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528,

534 (1973) (emphasis in original).[12] Harming individuals for conduct that is concededly lawful is particularly offensive to the Constitution. Similarly, "[j]ust as the intentional harming of a group is not a legitimate goal, so too the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest." *Medora v. Colautti*, 602 F.2d 1149, 1155 n.14 (3d Cir. 1979). Punishing the Affiliated Corporations is thus neither a legitimate end in itself nor a permissible means of mandating conduct on the part of Twin City and other companies that might want to leave New Jersey.

### 2. There Is No Rational Connection Between The Punishments Imposed By New Jersey And The Express Purpose Of The Statute On Which The Punishments Were Based.

In the courts below, Respondent argued that the Order furthers a legitimate public purpose by ensuring, pursuant to FAIRA, the orderly withdrawal of Twin City from the private passenger automobile insurance market. That argument is specious. Respondent's obvious aim was to *prevent* Twin City's exit from this market altogether. A-98. Accordingly, there is no rational connection between the conditions imposed and the averred aim of ensuring Twin City's orderly withdrawal.

The Forfeiture Condition is especially irrational. If, indeed, the purpose of FAIRA is to ensure an orderly withdrawal by automobile insurers, the Forfeiture Condition makes a mockery of that purpose by forcing additional withdrawals and disrupting various markets. There can be no rational nexus between Twin City's desire to exit from selling private passenger insurance and the requirement that seven affiliated corporations forfeit their right to engage in lines of business unrelated to private passenger automobile insurance. This con-

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12 *Moreno* was an equal protection case, but the question of whether a given state purpose is *legitimate*, and whether that purpose is rationally furthered by the state's chosen means, is logically the same whether analyzed under the rubric of equal protection or substantive due process.

dition imposed on the grant of "permission" for Twin City to exit is in effect a denial, not an approval. The Forfeiture Condition is clearly counterproductive because it requires, among other things, that the Affiliated Corporations *stop selling private passenger automobile insurance*. Thus, it even creates instability in the very market that the withdrawal statute purports to protect. This feature of the condition is particularly harmful because it requires one affiliate to terminate coverage for members of the American Association of Retired Persons. In sum, there is simply no rational connection between the Forfeiture Condition and orderly withdrawal. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-837 (1987), this Court recently reaffirmed the need for a nexus between conditions imposed by government and the purpose of regulation under which conditions are imposed. Where, as here, the necessary nexus between the condition and statutory purpose is lacking, the condition becomes nothing less than " 'an out-and-out plan of extortion.' " *Id.* at 837 (citation omitted).

Similarly, the Mandatory New-Business Condition has the potential for severely counterproductive effects. This condition permits Twin City to withdraw only if it takes on large numbers of new policyholders for a period of five years. As a result of this condition, Twin City's automobile policies have multiplied from 15,971 in March of 1990 to 36,627 as of September of 1992. *See* note 5, *supra*. Aside from forcing Twin City to accept enormous new exposure to liability, this condition raises the specter that a much larger group of policyholders will be disrupted when Twin City's withdrawal finally is allowed to occur.

The draconian conditions on exit imposed by New Jersey constitute a national threat to economic liberty and free enterprise. Having been publicly endorsed by the New Jersey Supreme Court, Respondent's unconstitutional restraints on exit represent an attractive option for regulators around the country.[13] Insurance problems in many states have reached cri-

13 Unfortunately, government officials looking for easy solutions have found it difficult to resist the temptation to utilize unconstitutional conditions to disguise coercion as choice. Accordingly, too often in the history of this country government has attempted to infringe a wide variety

sis proportions, *see, e.g.*, notes 8-9, *supra*, and New Jersey's solution undoubtedly will be noticed by regulators looking for a quick fix. Massachusetts already has in place a statutory scheme that permits actions like New Jersey's—and has

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of constitutional rights. Fortunately, this Court has been alert to these schemes and has continuously invalidated them in connection with various constitutional provisions. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62 (1990) (doctrine of unconstitutional conditions used to invalidate political patronage practices under the First Amendment); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (doctrine used to invalidate conditioning permit to rebuild house on property owners' transfer of public easement across beachfront property—Takings Clause); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (doctrine used to invalidate statute forbidding federally funded noncommercial educational broadcasting station from editorializing—First Amendment); *Thomas v. Review Board of The Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (doctrine used to invalidate denial of unemployment benefits because claimant's religious beliefs forbade participation in production of armaments—First Amendment); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (doctrine used to invalidate amendment to the Food Stamp Act that conditioned eligibility on being a member of a related household—Equal Protection Clause); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (doctrine used to invalidate coerced confessions in criminal proceedings—Fourteenth Amendment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (doctrine used to invalidate eligibility provisions of unemployment compensation statute that denied benefits to claimant who refused employment due to religious beliefs—Free Exercise Clause); *Speiser v. Randall*, 357 U.S. 513 (1958) (doctrine used to invalidate provision of California law that conditioned tax exemption on nonadvocacy of overthrow of the government by unlawful means—Due Process Clause); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926) (doctrine used to invalidate New Mexico statute that prohibited a foreign insurance company from paying commissions to nonresidents—Due Process Clause); *Buck v. Kuy-Kendall*, 267 U.S. 307 (1925) (doctrine used to invalidate state statute that prohibited common carriers from using highways without obtaining a permit—Commerce Clause); *Terral v. Burke Constr. Co.*, 257 U.S. 352 (1922) (doctrine used to invalidate Arkansas statute that prohibited foreign corporations from using federal courts); *Union Pac. R.R. Co. v. Public Service Comm'n of Missouri*, 248 U.S. 67 (1918) (doctrine used to invalidate state charge for a certificate authorizing the issue of bonds secured by a mortgage—Commerce Clause).

We submit that it is time once again for this Court to remind the states that deprivation of constitutional rights may not be accomplished behind a smokescreen of "choices."

attempted to use it to prevent insurer withdrawal. Maine has expressly relied on the decision of the New Jersey Supreme Court in this case to support a scheme of capital assessments applied to insurers that wish to exit from the State's workers' compensation morass even though such insurers have never written workers' compensation insurance there. Other states likely will follow the lead of New Jersey, Massachusetts, and Maine, and the rights of corporations to move freely across state lines will be gravely imperiled. We respectfully submit that this Court should send a clear message that oppressive regulation of the freedom of a business to exit a market simply will not be tolerated in New Jersey or anywhere else in the Nation.

## II.

## This Case Presents An Opportunity (1) To Provide Direction To The States On The Proper Limits Of Regulatory Confiscation, And (2) To Apply The "Categorical Rule" For Providing Compensation For Takings To Cases In Which A State Totally Deprives A Company Of Intangible Property In Order To Coerce The Continuation of Business.

Through a novel scheme of regulatory coercion, Respondent has ordered Petitioners to surrender valuable property with no compensation in violation of the Takings Clause, and the New Jersey Supreme Court mistakenly has approved this wrongful conduct. Absent action by this Court, the people of this Nation are at risk that other states will emulate New Jersey's unconstitutional but bluntly effective tactics whenever they want to solve public problems expediently by foisting them onto private parties.

"The Fifth Amendment guarantees that private property shall not 'be taken for public use, without just compensation.' " *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).[14] Respondent's

14 The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

Order violates that guarantee by requiring Twin City to forfeit all of its non-private passenger business in New Jersey (the Other-Business Condition), and by requiring the seven Affiliated Corporations to surrender their entire books of business (the Forfeiture Condition).

When a person's entire property interests have been taken, this Court applies a "categorical" rule and finds that compensation must be provided without further inquiry into specific facts. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Although the taking in *Lucas* involved real property, Petitioners respectfully submit that the categorical rule should apply in the instant case where the State has totally deprived parties of the value of intangible property—here, Petitioners' respective licenses and businesses in New Jersey and the many millions of dollars in premiums that flow annually from that business.

In *Lucas*, Justice Scalia discussed the justification for applying the categorical rule to cases in which a state precludes all economic use of real property. *Id.* at 2894-2895. His rationale that "total deprivation of beneficial use" is the functional equivalent of a physical taking, *id.* at 2894, applies here where the Forfeiture and Other-Business Conditions obliterate all economic value of Petitioners' commercial property in New Jersey.[15]

Justice Scalia further observed that total deprivations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious harm." *Id.* at 2895. That observation is precisely the situation at bar: New Jersey seeks to force private passenger automobile insurers to bail out the State's failed JUA by threatening to destroy the property of the Affiliated Cor-

15 The New Jersey Supreme Court's attempt to denigrate property rights by noting that the Affiliated Corporations remained free to sell insurance in *other* states points up its error. The critical issue that the court missed is that the Forfeiture Condition completely destroys the value of the Affiliated Corporations' property in New Jersey and is thus unconstitutional regardless of the existence of property in other states.

porations. The inequitable consequence of this purpose is to shift the burden of the government's mistakes onto the stockholders of insurance companies, who were not responsible for creating the problem. Constitutional protections, however, are intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "To have the state first create the crisis with a set of stringent regulations and then use that crisis to justify still more extensive state regulation is an open invitation for government irresponsibility." Epstein, *supra* at 165.

In 1991, Twin City and the Affiliated Corporations generated $66,859,921 and $192,268,583, respectively, in premiums from doing business in New Jersey's various insurance markets. *See supra* note 4. Absent application of the categorical rule to cases involving the loss of intangible property, an individual who is deprived of a fraction of an acre of land will enjoy greater constitutional protection than an individual who is deprived of millions of dollars in business through the taking of a license. This Court may correct this anomaly by granting this petition for certiorari.

Even without applying the categorical rule to this case, the Forfeiture and Other-Business Conditions result in a taking. This Court has long recognized that when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). When, as in this instance, a state destroys property rights through conditions that fail to further the law pursuant to which the conditions are imposed, this Court has deemed those conditions to be an unconstitutional " 'out-and-out plan of extortion.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (citation omitted).

In determining whether regulation "goes too far" in a particular case, this Court considers three factors: (1) the economic impact of the regulation; (2) the extent of interference with "distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transp. Co.*, 438 U.S. at 124 (citation omitted). Should this Court grant

certiorari, Petitioners will demonstrate unequivocally that each of these factors compels a finding of an unjust taking.

The economic impact of the Forfeiture Condition on the Affiliated Corporations and Twin City is devastating. The New Jersey Supreme Court conceded that "the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business . . . ," A-28, which in 1991 generated annual premiums of $125,408,662. Likewise, Twin City must surrender non-private passenger automobile premiums that totalled more than $37,228,038 in 1991.[16] Moreover, under the Mandatory New-Business Condition, Twin City projects losses of approximately $100 million during the five years prior to exit, at which point Petitioners will lose all of their business in New Jersey.

Twin City and the Affiliated Corporations have operated in New Jersey for many years. During that period, Petitioners have acquired business licenses, generated valuable good will, compiled valuable customer information, created valuable relationships with related businesses, and otherwise obtained a large bundle of property rights. *See Dugan v. Dugan*, 457 A.2d 1, 6 (N.J. 1983) (goodwill is property); *New Jersey Dep't of Envtl. Protection v. Atlantic States Cast Iron Pipe Co.*, 575 A.2d 895, 901 (N.J. Super. App. Div. 1990) (business licenses are property); *De Vitis v. New Jersey Racing Comm'n*, 495 A.2d 457, 462 (N.J. Super. App. Div.), *cert. denied*, 508 A.2d 213 (N.J. 1985) (business licenses are property). Indeed, under New Jersey law, the very "right of a person to engage in a business of his choice is a property right [that] should be protected against arbitrary interference by the State. . . ." *Lane Distributors Inc. v. Tilton*, 81 A.2d 786, 792-793 (N.J. 1951). The Forfeiture and Other-Business Conditions obliterate all of these valuable property rights. Thus, the "economic impact" of these conditions is stark and strongly points to an unjust taking of Petitioners' property.

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16 The New Jersey Supreme Court failed to consider the impact upon Twin City of the forfeiture of its other business in the State, from which Twin City does not seek to withdraw.

Likewise, Respondent has interfered with Petitioners' reasonable, investment-backed expectations.[17] Twin City and the Affiliated Corporations had operated in New Jersey for many years and had been individually subjected to New Jersey regulations. Suddenly, in 1990, Respondent decided to treat the corporations as one entity. This action directly contradicted Respondent's prior behavior, and veered radically away from prior judicial precedents in the State. For example, at the time Twin City attempted to exit, the State had in place a venerable tradition of respecting the individual identity of separate corporations absent a showing of fraud or deception.[18] Significantly, Respondent has lodged no claim of wrongdoing against either Twin City or any of the Affiliated Corporations. Petitioners, therefore, had a well-grounded expectation that the State would respect their separate corporate identities. In addition, Petitioners reasonably expected to be able to withdraw. The New Jersey Supreme Court specifically had affirmed an insurer's right to surrender its license and withdraw from the automobile insurance business. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979).

Finally, the third factor to be considered—the character of the government's action—also supports a finding of a compensable taking. When government imposes a condition bearing upon property, this Court requires a nexus between the condition and the purpose of the statute or regulation that the

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17 In upholding the Order, the New Jersey Supreme Court unduly emphasized that Twin City should have expected government regulation. A-29. That proposition is self-evident. What Twin City did not expect was regulation that would grossly violate its constitutional rights.

18 The respect accorded to the individuality of separate corporations is well-established in New Jersey's common law. *See Cintas v. American Car & Foundry Co.*, 25 A.2d 418, 421-422 (N.J. Ch.), *aff'd*, 28 A.2d 531 (E. & A. 1942) (New Jersey's then highest court affirmed the opinion that the corporate form should be disregarded "only when it is necessary to do so in order to prevent fraud, deception, evasion or injustice."). *See also State Dep't of Envtl. Protection v. Ventron Corp.*, 468 A.2d 150, 164-165 (N.J. 1983); *Mueller v. Seaboard Commercial Corp.*, 73 A.2d 905, 908 (N.J. 1950) (citing *Irving Investment Corp. v. Gordon*, 69 A.2d 725, 728 (N.J. 1949)).

condition supposedly serves. Without such a nexus, this Court will find a taking. *See Nollan*, 483 U.S. at 836-842.

Here, Respondent imposed the conditions in his Order pursuant to Section 72 of FAIRA, which provides for "an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally or on the company's policyholders." A-57. As was the case in *Nollan*, the conditions in Respondent's Order are patently unrelated to the stated purpose of the relevant law, namely, orderly withdrawal. The forced surrender of non-private passenger insurance business by Twin City does not protect the public generally but instead creates instability in the affected markets by ousting insurers willing and able to serve them. That the Forfeiture Condition requires the Affiliated Corporations to discontinue writing *private passenger automobile insurance* is absurdly counterproductive because it promotes instability in the very market that Respondent is mandated to protect.

In sum, the Forfeiture and Other-Business Conditions are paradigms of regulation that has "gone too far." Unchecked, the power to regulate has become the power to destroy. By finding New Jersey's action unconstitutional under the Takings Clause, this Court will give the states important direction as to the proper limits of regulation that confiscates intangible property, which in modern life is of paramount importance to the economic well-being of this Nation.

## CONCLUSION

For the foregoing reasons, we respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-101 September Term 1991

# IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

Argued March 17, 1992 Decided July 29, 1992

On appeal from and on certification to the Superior Court, Appellate Division, whose opinion is reported at 248 N.J. Super. 616 (1991).

*Taylor R. Briggs*, a member of the New York bar, argued the cause for appellants Twin City Fire Insurance Company, Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of Connecticut, New England Insurance Company, Hartford Life and Accident Insurance Company, and Hartford Life Insurance Company (*LeBoeuf, Lamb, Leiby & MacRae*, attorneys; *Mr. Briggs and Wesley S. Caldwell, III*, of counsel; *Mr. Briggs, Mr. Caldwell, Laura B. Barry, James R. Martino* and *Stephen H. Orel*, on the briefs).

*Jack M. Sabatino*, Assistant Attorney General, argued the cause for respondent Commissioner of Insurance (*Douglas S. Eakeley*, Acting Attorney General of New Jersey,

attorney; *Mr. Sabatino* and *Carol Johnston*, Deputy Attorney General, on the brief).

*Elmer M. Matthews* argued the cause for *amicus curiae* American Insurance Association (*Clapp & Eisenberg*, attorneys; *Mr. Matthews* and *Frederic S. Kessler*, on the brief).

*Deborah T. Poritz* submitted a letter in lieu of brief on behalf of *amici curiae* State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, State Farm Life Insurance Company, and State Farm Annuity and Life Insurance Company (*Jamieson, Moore, Peskin & Spicer*, attorneys).

*John J. Degnan*, General Counsel, submitted a letter in lieu of brief on behalf of *amici curiae* Chubb Insurance Company of New Jersey, Federal Insurance Company, Vigilant Insurance Company, Pacific Indemnity Company, Great Northern Insurance Company and Chubb Custom Insurance Company.

The opinion of the Court was delivered by

STEIN, J.

Twin City Fire Insurance Company (Twin City) challenges the constitutionality of the order issued by the Commissioner of Insurance (Commissioner) conditioning the termination of its authority to write insurance in New Jersey. Twin City objects primarily to two conditions: the so-called "forfeiture" condition, which requires that the separate corporations affiliated with Twin City as members of the ITT Hartford Group, Inc. (ITT Hartford) surrender their respective certificates of

authority within five years and withdraw from the state; and the so-called "new-business condition," which requires that during its withdrawal from the state over a five-year period Twin City comply with existing laws, including those provisions of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8 (the Reform Act or the Act) requiring automobile insurers to participate equitably in the shifting of residual-market insureds to the voluntary market. See *N.J.S.A.* 17:30E-14. In a published opinion, the Appellate Division upheld the Commissioner's order except with respect to a modification consented to by the Commissioner eliminating two life- and health-insurance affiliates from the forfeiture condition, but remanded the matter to the Commissioner to afford Twin City the opportunity to have its withdrawal application reconsidered on the basis of regulations adopted subsequent to the Commissioner's order. 248 *N.J. Super.* 616, 641 (1991). We granted Twin City's petition for certification. ____ *N.J.* ____ (1991). We affirm.

I

Twin City is a property-casualty insurer licensed for more than twenty years to transact business in each of the fifty states and the District of Columbia. It has no plan to surrender its license in any jurisdiction other than New Jersey.

Twin City primarily writes private-passenger and commercial automobile insurance in New Jersey. Its 1989 private-passenger insurance premiums aggregated $16.3 million, or 1.032% of that market; its aggregate 1989 commercial-insurance premiums were $49.6 million, representing 13% of the market.

Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company (Hartford Fire), as are the other six Twin City affiliated companies affected by the Commissioner's order, as modified: Hartford Accident & Indemnity Company; Hartford Casualty Insurance; Hartford Underwriters Insurance Company; Hartford Insurance Company of the Midwest; Hartford Insurance Company of Connecticut; and New England

Insurance Company. ITT Hartford is the parent company of Hartford Fire and, derivatively through Hartford Fire, of Twin City and its six affiliated companies. Twin City and its affiliates market their products collectively under common trade names (The Hartford, The Hartford Insurance Group, and ITT Hartford Insurance Group), through independent insurance agencies appointed generally to represent member companies of ITT Hartford. Claims submitted to Twin City and its affiliates are commonly processed by employees of Hartford Fire pursuant to management agreements between Hartford Fire and its respective subsidiary companies. Twin City and its affiliates participate in reinsurance-pooling agreements with other member companies of ITT Hartford. Hartford Fire and the other six Twin City affiliates generated approximately $120 million in aggregate premiums from New Jersey insurance business in 1989, of which approximately $9 million was attributable to private-passenger automobile premiums and the balance to multiple lines of property and casualty insurance.

On March 7, 1990, Twin City tendered its Certificate of Authority for surrender to the Acting Commissioner of Insurance, accompanied by a letter forecasting that the impending adoption of the Reform Act would cause Twin City to incur "devastating losses in future years." The Reform Act was signed by Governor Florio on March 12, 1990. Section 72 of the Act, which applied retroactively to requests by insurers for surrender of Certificates of Authority submitted on or after January 25, 1990, provides:

> An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the pub-

> lic generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. *In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered.* The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.
>
> [Emphasis added.]

The Acting Commissioner immediately rejected Twin City's attempted surrender of its license, and informed Twin City that no termination could occur until the Commissioner had approved and Twin City had implemented a plan for orderly withdrawal in accordance with Section 72 of the Act. When Twin City declined to submit such a plan, the Department of Insurance (Department) sought and obtained injunctive relief, and Twin City was ordered to rescind notifications of withdrawal it had forwarded to its agents and cease all activities preparatory to termination of its business in New Jersey.

In response, on April 30, 1990, Twin City submitted a plan for orderly withdrawal, effective the following day, in which it proposed to withdraw from private-passenger automobile-insurance business in New Jersey by non-renewing its policies and withdrawing its rating system, retaining the authority to write other forms of insurance in the state. According to the Commissioner's order, Twin City's affiliates simultaneously communicated their intention to withdraw from the private-passenger automobile-insurance market by eliminating their rating systems for that insurance. The sole exception to the

affiliates' proposed withdrawal was an automobile- and homeowners-insurance program offered by Hartford Underwriters Insurance Company to members of the American Association of Retired Persons.

Twin City's rationale for its proposed withdrawal from the private-passenger automobile-insurance market, as explicated in arguments opposing the Department's application for injunctive relief, relied on financial projections prepared by Twin City in anticipation of adoption of the Reform Act. Those projections, prepared on the basis of estimated rate increases of 6.4% in 1990 and 8% in 1991 and 1992, calculated that Twin City would sustain underwriting losses in those three years of $3.8 million, $19 million, and $23.5 million, respectively, if it continued its present private-passenger automobile-insurance business.

In his Administrative Decision and Order of August 14, 1990 (No. A90-151), the Commissioner approved Twin City's plan subject to fourteen conditions. In challenging the Commissioner's Order and the constitutionality of Section 72 of the Reform Act in the Appellate Division, Twin City objected specifically to four of the conditions:

A. The "Five Year Condition"

Twin City must attempt to place its private-passenger automobile business with other insurers. If unsuccessful after five years, Twin City may then issue notices of non-renewal. Twin City cannot withdraw from the market until all of its policies have been placed with other carriers or have expired.

B. The "Other Business Condition"

Twin City shall be required to seek replacement carriers for its other lines of business for a period of five years. After five years Twin City must non-renew any remaining policies in force as they expire.

C. The "Forfeiture Condition"

Twin City's ITT Hartford affiliates must submit orderly plans of withdrawal from their respective markets providing for the termination of their transaction of insurance business within five years.

D. The "New-Business Condition"

During its withdrawal from the private-passenger automobile-insurance business over a five-year period, Twin City must comply with all provisions of the Reform Act including the requirement that it participate proportionately in the shifting of "assigned risk" or residual market insureds to the voluntary market.

The Appellate Division sustained the conditions and upheld the constitutionality of Section 72 of the Act. 248 *N.J. Super.* at 621-42. The court rejected Twin City's contention that the condition requiring Twin City's affiliates to surrender their licenses within five years was an unconstitutional taking of property without just compensation. In the Appellate Division's view, Twin City's affiliates could retain their respective lines of insurance in New Jersey if Twin City continued to write private-passenger insurance. Hence, the only "loss" mandated by the Act was the potential reduction in profits resulting from Twin City's compliance with the residual market depopulation and other provisions of the Reform Act, which the court characterized as " 'a slender reed upon which to rest a takings claim.' " *Id.* at 627 (quoting *Andrus v. Allard*, 444 *U.S.* 51, 66, 100 *S. Ct.* 318, 327, 62 *L. Ed.* 2d 210, 223 (1979)). The court also rejected Twin City's substantive-due-process argument, concluding that Section 72 of the Act and the Commissioner's order constituted a rational response to a private insurer's desire to withdraw from the private-passenger market, reflecting the strong governmental interest in encouraging all companies to share the burden of depopulating the residual market and reducing the cost of private-passenger automobile insurance. *Id.* at 630-38. The court summarily rejected Twin City's

equal-protection and Commerce Clause arguments. *Id.* at 639-40. Finally, the Appellate Division remanded the matter to the Commissioner to permit Twin City to have its withdrawal proposal adjudicated on the basis of the regulations adopted subsequent to the Commissioner's order. *Id.* at 640-41.

II

A. History and Overview of the Reform Act

A basic familiarity with the events and circumstances that prompted passage of the Reform Act, as well as an appreciation of the Act's anticipated impact on the private-passenger automobile insurance market, are essential prerequisites to an informed evaluation of the validity of the Commissioner's order. The Act's background and objectives are described comprehensively in *State Farm Mutual Automobile Insurance Co. v. State*, 124 *N.J.* 32 (1992), in which this Court sustained the constitutionality of the Reform Act against a facial challenge. We revisited the subject in *In re Department of Insurance's Order Nos. A-89-119 and A-90-125*, ____ *N.J.* ____, ____-____ (1992) (slip op. at 7-12), also filed today. Rather than summarize the critical developments that led to the Reform Act, we draw on Justice Handler's careful explanation in our *State Farm* opinion:

> For years, New Jersey's system of automobile insurance regulation, like those of many other states, has faced an intractable problem of providing coverage for high-risk drivers. Prior to 1983, drivers who could not obtain coverage directly from insurers in the voluntary market were insured through an Assigned Risk Plan (*N.J.S.A.* 17:29D-1), under which the Commissioner of Insurance apportioned high-risk drivers among all auto insurers doing business in New Jersey. In 1983, the Automobile Full Insurance Availability Act, *N.J.S.A.* 17:30E-1 through -24, replaced the assigned-risk system with the New Jersey Automobile Full Insurance Underwriting Association,

commonly known as the Joint Underwriting Association or JUA.

All insurers licensed to write automobile insurance in New Jersey were required to be members of the JUA. The objective of the new scheme was to create a more extensive system of allocating high-risk drivers to carriers, and through the JUA, to provide such drivers with coverage at rates equivalent to those charged in the voluntary market. * * *.

The JUA, a good deal more complex than the prior Assigned Risk Plan, worked as follows. Insurers (and subsequently certain qualified non-insurer entities) could apply to become "servicing carriers," which would bear administrative responsibility for collecting premiums, arranging coverage, and the like, and which would receive fees for such services from the JUA. However, the statute, the Plan of Operation, and the agreements between the JUA and servicing carriers all provided that claims and liabilities of the JUA would be borne by it independently; servicing carriers were to be insulated from such claims and liabilities.

Because the JUA insured high-risk drivers but also required that their rates be the same as voluntary-market rates (see *N.J.S.A.* 17:30E-13), it was anticipated that premium revenues would not cover costs of claims against JUA policies. Therefore, in addition to normal premium income, the JUA was also given income from Department of Motor Vehicle surcharges for moving violations and drunken driving convictions, policy "flat charges," and "residual market equalization charges," or RMECs, to be added to policy rates for voluntary-market insureds. *N.J.S.A.* 17:30E-8. Thus, the JUA was a system in which the insurance costs of high-risk drivers were subsidized by the imposition of fees on segments of the general population of motorists. The JUA was supposed to be operated on a no-profit, no-loss basis, with RMECs increased or

decreased as needed to accomplish that result.

However one may view the objectives of the JUA, the system did not achieve its goals. More and more drivers became unable to procure voluntary-market coverage, until by 1988 over 50% of New Jersey drivers had to be insured through the JUA. Claims against JUA insureds were sizeable and greatly exceeded the JUA's available income. Despite the imposition of substantial RMECs from 1988 through 1990, the JUA nonetheless accumulated a deficit of over $3.3 billion in unpaid claims and other losses.

Automobile insurance reform, including the reduction of the cost of insurance, and particularly some plan for eliminating the unwieldy JUA, repaying its debt, and replacing it with a more workable distribution of the automobile insurance market, became a priority for the Legislature and the executive branch in 1990. By March of that year the Reform Act had been adopted.

The principal goals of the Act were to reduce insurance costs for most New Jersey drivers, to depopulate the JUA by switching insureds to the voluntary market, and to create a funding mechanism to pay off the JUA debt. To these ends, the Act provided that the JUA would cease writing or renewing policies as of October 1, 1990. The "depopulation" of the JUA would be accomplished by classifying insured drivers into three categories: (1) high-risk drivers in the (revived) Assigned Risk Plan (10% of the market); (2) "non-standard" risk drivers, who would be insured by private insurers directly, but who could be charged rates up to 135% of those of standard risks (15% of the market); and (3) standard-risk, voluntary-market insureds covered at prevailing rates (the remaining 75% of the market). Presumably, the higher rates now to be charged high-risk and "non-standard" risk drivers should bring the premium income on such coverage in line with

actual costs, and this coverage would no longer be subsidized.

There remains, however, the problem of how to pay off the JUA's prior accumulated debt of over $3.3 billion; this, too, is addressed by the Reform Act. The Act creates the New Jersey Automobile Insurance Guaranty Fund (Auto Fund), a separate fund within the State Treasury, to collect and disburse the various payments designed to pay off the JUA debt. Reform Act, Section 23; *N.J.S.A.* 17:33B-5. The Act assigns to the Auto Fund certain sources of income that under the prior scheme went to the JUA, *e.g.*, surcharges for driving violations and drunken driving convictions. It also creates new sources of revenue for the Auto Fund, *e.g.*, fees on lawyers, doctors, and auto body repair businesses, higher automobile registration fees, and, most significant in the context of this litigation, the imposition of additional assessments and surtaxes on insurers.

The assessments imposed on insurance carriers are collected through the Property Liability Insurance Guaranty Association (PLIGA). Reform Act, Section 74, *N.J.S.A.* 17:30A-8a(9). PLIGA was created in 1974 to impose assessments on New Jersey property-casualty insurers to pay claims against carriers that had become insolvent. (*L.* 1974, *c.* 17; *N.J.S.A.* 17:30A-1 through 17:30A-20). The Reform Act requires PLIGA to make additional assessments to be applied exclusively to the JUA debt. These assessments, denominated by the Act as "loans," are paid into the Auto Fund. *N.J.S.A.* 17:30A-8a(10). They are to be set at rates designed to net $160 million per year for eight years (1990 through 1997); for 1990, the assessments represented 2.7% of net premiums of the property-casualty insurers.

Section 75 of the Reform Act, *N.J.S.A.* 17:30A-16, addresses recoupment from policyholders of PLIGA

assessments both for insolvencies and for the JUA bailout. Insurers have always been permitted to pass through the insolvency assessments to policyholders. The insolvency pass through originally was accomplished by rate increases, but in 1979 the method was changed to direct surcharges on policy premiums. The surcharges for insolvency assessments continue to be authorized under the Reform Act. *N.J.S.A.* 17:30A-16a. However, the Act expressly prohibits such surcharges to recover the new assessments for the JUA bailout. Section 75b states:

> No member insurer shall impose a surcharge on the premiums of any policy to recoup assessments paid pursuant to [the provision requiring assessments to be loaned to the Auto Fund]. [*N.J.S.A.* 17:30A-16b.]

In addition to the new assessments, the Reform Act, Section 76, imposes a special surtax on insurers to go toward the JUA bailout. *N.J.S.A.* 17:33B-49. This surtax is a greater amount, 5% of net premiums, but is imposed for a shorter period (only three years, 1990, 1991 and 1992), than the assessments. The additional surtax is designed to net a total of $300,000,000 over the three-year period into the Auto Fund. Reform Act, Section 77, *N.J.S.A.* 17:33B-50. Because the objective is to secure $300 million in net proceeds, the 5% surtax rate can be adjusted, depending upon the amount of insurers' net premiums. The 5% rate cannot be *exceeded*, and it is theoretically possible that the Director of Taxation could lower the rate; but such a lowering could occur only if automobile insurance net premiums increased significantly, a highly unlikely event given both the supposed premium-reducing effects of the Act and current market conditions. The Reform Act, Section 78, addresses the question of whether the additional surtaxes can be charged to consumers:

> The Commissioner of Insurance shall take such action as is necessary to ensure that private passenger automobile insurance policyholders shall not pay for the surtax imposed pursuant to section 76. [*N.J.S.A.* 17:33B-51.]

[124 *N.J.* at 40-45 at (citations omitted).]

In *State Farm*, the insurers had argued that those provisions of the Reform Act that prohibited the pass through to policyholders of the assessments and surcharges imposed by the Act to pay off the JUA's $3.3 billion indebtedness would necessarily cause the insurers to operate at a loss and thus be deprived of a constitutionally-adequate rate of return. We noted, however, that Section 2g of the Act, *N.J.S.A.* 17:33B-2g, which had been added by an amendment introduced when the Reform Act was before the Assembly Appropriations Committee, specifically provided that "insurers 'are entitled to earn an adequate rate of return' " through the ratemaking process. 124 *N.J.* at 57-58. We also observed that "emergency regulations" adopted by the Commissioner while the *State Farm* litigation was pending established a new procedure to afford rate relief to insurers that could demonstrate that payment of the surtaxes and assessments had denied them a fair rate of return. *Id.* at 59-61. Hence, we rejected the facial challenge to the constitutionality of the Reform Act because we were satisfied that the regulatory provisions for rate relief and the legislative assurance of a fair rate of return demonstrated that the passthrough prohibitions of Sections 75 and 78 of the Act "do not necessarily preclude all insurers from earning a fair rate of return." *Id.* at 61-62. We also note in passing our recent interpretation of the statutory flex-rate-increase provisions, *N.J.S.A.* 17:29A-44, which allow insurers to raise rates without prior regulatory approval. We held that the Commissioner's statutory authority to modify the statewide average rate change does not authorize any reduction in the three-percentage-point rate increase authorized by statute. *Department of Ins.'s Order Nos. A-89-119 and A-90-125*, *supra*, ____ *N.J.* at ____ (slip op. at 2).

B. The Commissioner's Order

The thirty-five page Administrative Decision and Order issued by the Commissioner includes a thorough explanation for the imposition of severe conditions on Twin City's proposed withdrawal. The Commissioner observed generally that New Jersey's private-passenger automobile-insurance market is undergoing "transition and adjustment," primarily because of the burdens imposed on insurers by the Reform Act. The Commissioner noted that a precipitous withdrawal by Twin City would disrupt market stability, and that a gradual withdrawal would allow the voluntary market sufficient time to absorb Twin City's business while simultaneously "adjusting to the reforms imposed by the * * * Act." The Commissioner also observed that Twin City's application could not be considered in a vacuum, citing thirty-two other pending requests for withdrawal submitted since adoption of the Act, and noting that insurers that historically had profited from New Jersey business should be "prevented from leaving * * * in a hasty or disorderly manner."

Concerning the forfeiture condition, the Commissioner preliminarily emphasized the intensity of insurance regulation in New Jersey and the necessity that he use his regulatory authority to discourage non-renewal of large blocks of business as a component of his regulatory control over market entry and exit. The Commissioner expressed concern that Twin City's withdrawal would exacerbate the difficulty of absorbing insureds from the residual market, a burden that the Reform Act contemplated would be shared by all insurers in order to resolve "a severe crisis in automobile insurance in this State." He implied that Twin City and its affiliates sought to avoid their share of the obligations imposed by the Act while enjoying the benefits of marketing other highly-profitable lines of insurance. The Commissioner pointed out that Twin City's automobile-insurance business historically had been profitable on a national basis, that he assumed that Twin City's automobile business would continue to be profitable under the Reform Act, and that he did not accept Twin City's assertion that its

automobile business would be unprofitable. He also cited Twin City's failure to have applied for a prior approval rate increase since 1988, and its decision not to avail itself of a flex-rate increase for 1989 or 1990. The Commissioner also noted that Twin City could not attribute its planned withdrawal to a hazardous financial condition. The Commissioner observed that if Twin City and its affiliates preferred withdrawal from the private-passenger automobile insurance business, and as a corollary the abandonment of the obligations imposed on all insurers by the Reform Act, then ITT Hartford could not reasonably expect to maintain more-profitable lines of business in New Jersey.

The Commissioner also expressed the view that because continuation of private-passenger automobile insurance is "uniquely in the public interest," the requirement that Twin City's affiliates withdraw from other lines of business would make that business available to other insurers who will be enabled to enhance their profitability. He predicted that the availability of such other business, resulting from the mandated withdrawal of Twin City's affiliates, would encourage existing companies to remain in and would attract new companies to New Jersey's private-passenger automobile-insurance market.

III

Before us, Twin City and *amicus curiae*, American Insurance Association, have focused their challenge to the Commissioner's order on two of the fourteen conditions, the "forfeiture condition," requiring Twin City's affiliates to terminate business in New Jersey within five years, and the "new-business condition," which requires Twin City during its withdrawal from New Jersey to comply with the Reform Act and participate equitably in the shift of residual-market insureds to the voluntary market. They attack the new-business condition as a violation of substantive due process, and the forfeiture condition as denying the affiliated companies the equal protection of the laws and as an unconstitutional taking of property with-

out just compensation. *Amicus* also asserts that the forfeiture condition violates the Commerce Clause of the United States Constitution, as well as the so-called "unconstitutional conditions" doctrine. We address each of the arguments in turn.

A. Substantive Due Process

Although Twin City limits its due-process argument to the new-business condition, apparently conceding the validity under due-process principles of the forfeiture condition, our analysis is sufficiently broad to embrace both conditions. Our decisions have established, as have those of the United States Supreme Court, that "a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory. * * * [I]f a statute is supported by a conceivable rational basis, it will withstand a substantive due process attack." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 563 (1985) (citations omitted). We described the proper function of the courts in this area in *Hutton Park Gardens v. Town Council*, 68 *N.J.* 543 (1975):

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."
>
> [*Id.* at 562 (quoting *Nebbia v. New York*, 291 *U.S.* 502, 537, 54 *S. Ct.* 505, ____, 78 *L. Ed.* 940, 957 (1934)).]

*Accord Duke Power Co. v. Carolina Envtl. Study Group*, 438 *U.S.* 59, 82-84, 98 *S. Ct.* 2620, ____, 57 *L. Ed.* 2d 595, 617-18 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 *U.S.* 1, 15, 96 *S. Ct.* 2882, ____, 49 *L. Ed.* 2d 752, 766 (1976); *Ferguson v. Skrupra*, 372 *U.S.* 726, 730-32, 83 *S. Ct.* 1028, ____, 10 *L. Ed.*

2d 93, 97-98 (1963); *Williamson v. Lee Optical*, 348 *U.S.* 483, 488, 75 *S. Ct.* 461, ____, 99 *L. Ed.* 563, 572 (1955).

In assessing the constitutionality of Section 72 of the Reform Act and of the conditions imposed by the Commissioner pursuant to its authorization, we observe at the outset that insurance is "a business to which the government has long had a 'special relation.' " *California State Auto. Ass'n v. Maloney*, 341 *U.S.* 105, 109, 71 *S. Ct.* 601, ____, 95 *L. Ed.* 788, 792 (1951). The principle that "the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare" is long settled and well-established. *Sheeran v. Nationwide Mut. Ins. Co.*, 80 *N.J.* 548, 559 (1979).

In the context of the broad and comprehensive regulatory authority of the state over the business of insurance and the tolerant standard by which due-process challenges to such regulation must be addressed, we find no merit in Twin City's contention that the new-business condition violates its due-process rights. Viewed against the backdrop of New Jersey's chronic difficulties in assuring coverage for substandard private-passenger automobile insureds, the justification for imposing that condition on Twin City's right to withdraw is not merely rational, it is compelling. To the extent Twin City's contention addresses the obligation to renew existing policies during its five-year withdrawal process, that obligation is hardly an onerous one. As it withdraws over a five-year period, Twin City must either place its existing policies with other carriers or renew them in order that its insureds not be disadvantaged by its withdrawal. We sustained an analogous be requirement in *Sheeran, supra*, 80 *N.J.* at 561, and entertain no doubt about its reasonableness or its validity.

We are also convinced that due process is not offended by the Commissioner's requiring Twin City to comply, during its withdrawal period, with the Reform Act's mandate that the shift of insureds from the residual to the voluntary market be shared equitably by all insurers. As long ago as 1951 the United States Supreme Court upheld against a due-process

challenge a California statute authorizing that state's insurance commissioner to approve "a reasonable plan for the equitable apportionment" among insurers of substandard risk drivers. *California State Auto. Ass'n*, *supra*, 341 *U.S.* at 107, 110-11, 71 *S. Ct.* at , ____, 95 *L. Ed.* at 791, 793. New Jersey's extraordinary difficulties with assigned-risk drivers, resulting in the JUA's staggering deficit, provoked the Reform Act's mandatory residual-market depopulation provisions. *State Farm*, *supra*, 124 *N.J.* at 41-42. Because the Act requires all insurers to participate equitably in the shift from the residual to the voluntary market, see *N.J.S.A.* 17:30E-14, the Commissioner's imposition of that statutory obligation as a condition of Twin City's withdrawal is not only rational and fair but virtually required by the Act. That an insurer who enjoyed profitable operations during the pre-Reform Act period could abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers would be inequitable. Twin City's obligation to participate in depopulation of the residual market is limited to five years or such shorter period within which it places its policies with other carriers. The new-business condition does not violate due process.

We are equally convinced that, although not asserted as a due-process violation, the forfeiture condition does not violate the due-process rights of Twin City and its affiliates in ITT Hartford. In its challenge to the forfeiture condition as an unconstitutional taking of property without just compensation, see *infra* at ____-____ (slip op. at 27-37), Twin City protests that the Commissioner had no regulatory basis for ignoring the separate corporate status of its affiliates by requiring the termination of their New Jersey business as a condition of Twin City's withdrawal. Although the United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved, *Nollan v. California Coastal Comm'n*, 483 *U.S.* 825, 834 n.3, 107 *S. Ct.* 3141, ____, n.3, 97 *L. Ed.* 2d 677, 688 n.3 (1987),

both tests focus on the strength of the connection between the government's objective and its regulatory action. By either standard, Twin City's interrelationship with its affiliates is indisputably sufficient to justify a regulatory approach that treats them pragmatically as a single entity.

Twin City's own Plan of Withdrawal establishes that ITT Hartford owns and controls Hartford Fire and, in turn, owns and controls Twin City and its other affiliates. The companies market their products under common names, use the same insurance agents designated for them by ITT Hartford, process their claims collectively through employees of Hartford Fire, and participate in reinsurance-pooling agreements with other ITT Hartford companies. At oral argument, counsel acknowledged that ultimately the decision whether Twin City and the affiliates would remain or withdraw from New Jersey would be made by ITT Hartford's management. Whether Twin City and its affiliates operate as divisions of a single corporation or as subsidiary corporations of an integrated insurance holding company, a responsible regulator could hardly ignore their common ownership and operational interdependence.

Although the Reform Act unquestionably renders more burdensome and less profitable the private-passenger automobile-insurance business in New Jersey, our decision in *State Farm* determined that the Act contemplates that insurers will earn a fair return, and it thus cannot facially be construed to deny insurers a fair rate of return. 124 *N.J.* at 62. Twin City's decision to withdraw apparently reflects the unwillingness of ITT Hartford to subject Twin City to what may be a difficult and burdensome regulatory process. The option of Twin City's withdrawal, however, would be unavailable to ITT Hartford if the affiliates were divisions under common ownership rather than subsidiaries under common control.

As the Commissioner's order observed, the withdrawal of any private-passenger insurers in the current difficult regulatory climate increases the burdens on those insurers who remain, burdens attributable to the more favorable regulatory conditions enjoyed by Twin City before the passage of the

Reform Act. Other private-passenger insurers have also sought withdrawal, following Twin City's example. In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw—in other words, strong medicine—would be effective. If the forfeiture condition discourages withdrawal, a substantial State interest—retention of private-passenger insurers—will have been advanced. If it fails to discourage Twin City's withdrawal, the availability for acquisition of its affiliates' insurance business may operate as an inducement to other multi-line carriers to remain in New Jersey, thereby advancing an analogous and equally substantial State interest.

Twin City's reluctance to assert a substantive due-process challenge to the forfeiture condition rather persuasively demonstrates the strength of the regulatory interest advanced by that condition. We hold that that regulatory interest is more than adequate to sustain the forfeiture condition against a substantive-due-process challenge. That the forfeiture condition also " 'substantially advance[s]' the 'legitimate state interest' sought to be achieved," *Nollan*, *supra*, 483 *U.S.* at 834 n.3, 107 *S. Ct.* at n.3, 97 *L. Ed.* 2d at 688 n.3 (quoting *Agins v. Tiburon*, 447 *U.S.* 255, 260, 100 *S. Ct.* 2138, ____, 65 *L. Ed.* 2d 106, 112 (1980))—the *Nollan* Court's governmental-interest test for takings—is also self-evident from our analysis. See *infra* at ____ (slip op. at 37).

B. Equal Protection

Twin City argues first that Section 72 of the Reform Act and the Commissioner's application of the license forfeiture condition denies it equal protection of law because "[i]nsurers that are not licensed to write private passenger auto insurance and are not affiliates of companies authorized to write such insurance do not have to write private passenger auto insurance as a condition of retaining their licenses" Furthermore, Twin City charges that it is the victim of irrational disparate treatment by the Commissioner. It claims that Crum and Forster Insurance

Co. was permitted to withdraw from the private-passenger automobile-insurance market by transferring its business to another insurer without its affiliates forfeiting their licenses. It also claims that two subsidiaries of the CIGNA holding company system were permitted to withdraw without any forfeiture of the licenses of other CIGNA affiliates.

The Appellate Division rejected Twin City's first contention, holding that the distinction between companies already in the private-passenger automobile-insurance market and those that did not provide such insurance was "obviously related to a legitimate state interest." 248 *N.J. Super.* at 639 (citing *New Orleans v. Dukes*, 427 *U.S.* 297, 303, 96 *S. Ct.* 2513, 2516, 49 *L. Ed.* 2d 511, 516-17 (1976) (upholding ordinance prohibiting vendors selling foodstuffs from pushcarts in the French Quarter, but exempting vendors selling in French Quarter for eight years or more)). We are fully in accord with the Appellate Division's determination. The test for the distinction challenged by Twin City is whether the classification is rationally related to some legitimate government purpose. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 *U.S.* 648, 668, 101 *S. Ct.* 2070, ____, 68 *L. Ed.* 2d 514, 530-31 (1981); *Greenberg, supra*, 99 *N.J.* at 567 (if right not fundamental, the government regulation will receive more-relaxed standard of judicial review); *Joseph H. Reinfeld, Inc. v. Schieffelin & Co.*, 94 *N.J.* 400, 411 (1983). Although a different regulatory choice could have been made, to place the burden of depopulating the residual market on insurers currently writing private-passenger automobile insurance surely is a regulatory determination sufficiently reasonable to withstand an equal-protection challenge.

Nor is there an equal-protection violation established by the Commissioner's determination not to impose Section 72 conditions on Crum & Forster and CIGNA, whose withdrawals from the New Jersey private-passenger automobile market were part of a nationwide withdrawal from that market. The Commissioner rationally could conclude that an insurer withdrawing nationally from the private-passenger automobile mar-

ket was not motivated by an intention to avoid the burdens of the depopulation and other provisions of the Reform Act and therefore should not be subjected to the conditions imposed on Twin City. Because we are satisfied that plausible reasons support the distinction in the regulatory treatment accorded to Crum & Forster and CIGNA, we have no doubt that the imposition of the forfeiture and new-business conditions on Twin City does not deny it equal protection of the laws. See *U.S. Const.* amend. XIV, § 1.

C. Commerce Clause

In response to the contention that Section 72 of the Reform Act violates the Commerce Clause, the Appellate Division stated:

> We also reject the various arguments advanced by *amicus* that Section 72 violates the commerce clause. By enactment of the McCarran-Ferguson Act, 15 *U.S.C.S.* § 1011 *et seq.*, Congress has expressly left to the states the regulation of the insurance business. Its purpose is to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 *U.S.* 408, 429, 66 *S. Ct.* 1142, 1155, 90 *L. Ed.* 1342, 1360 (1946).
>
> [248 *N.J. Super.* at 639-40.]

We are in accord with the Appellate Division's disposition of the Commerce Clause issue.

D. The Takings Issue

Twin City's principal contention before us is that the forfeiture condition, requiring its affiliates to forfeit their licenses and transfer their New Jersey insurance business to competitors, constitutes an unconstitutional "taking" of its property for public use without just compensation. *U.S. Const.* amend. V; *N.J. Const.* art. I, ¶ 20. It argues that the Appellate Division, in addressing the "takings" issue, improperly focused on the

losses Twin City would incur if it remained in New Jersey rather than on its affiliates' forced surrender of approximately $120 million in aggregate annual-premium income in the event Twin City elects to surrender its license.

As the United States Supreme Court has recently observed, "takings" cases can generally be divided into two distinct categories: cases in which the government takes title to or physically occupies property, generally requiring that compensation be paid; and cases in which the government regulates the permitted uses of property, which require fact-specific determinations on whether compensation is mandated. *Yee v. City of Escondido*, 503 *U.S.* ____, ____, 112 *S. Ct.* 1522, ____, 118 *L. Ed.* 2d 153, 162 (1992). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104, 124, 98 *S. Ct.* 2646, 2659, 57 *L. Ed.* 2d 631, 648 (1978). Concerning the second class of cases, the Court observed:

> But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g., Penn Central Transp. Co. v. New York City, 438 US 104, 123-125, 57 L Ed 2d 631, 98 S Ct 2646 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.
>
> [*Id.* at ____, 112 *S. Ct.* at ____, 118 *L. Ed.* 2d at 162.]

As a general proposition, the Supreme Court has recognized that the "Fifth Amendment's guarantee * * * [is] designed to

bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 *U.S.* 40, 49, 80 *S. Ct.* 1563, ____, 4 *L. Ed.* 2d 1554, 1561 (1960). Nevertheless, the Court consistently has refrained from proposing or adopting rigid or precise principles for determining when a compensable taking has occurred, favoring instead a "highly nonformal, open ended, multi-factor balancing method." Frank Michelman, *Takings*, 1987, 88 *Colum. L. Rev.* 1600, 1621 (1988). As Justice Brennan acknowledged in *Penn Central*, *supra*, 438 *U.S.* 104, 98 *S. Ct.* 2646, 57 *L. Ed.* 2d 631, the Court has simply

> been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 US 590, 594, 8 L Ed 2d 130, 82 S Ct 987 (1972). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."
>
> [*Id.* at 124, 98 *S. Ct.* at 2459, 57 *L. Ed.* 2d at 648 (quoting *United States v. Central Eureka Mining Co.*, 357 *U.S.* 155, 168, 78 *S. Ct.* 1097, ____, 2 *L. Ed.* 2d 1228, 1236 (1958)).]

Nevertheless, as a guide to the *ad hoc* inquiry implicated by regulatory "takings" claims, the Court has identified three factors as having particular significance: the character of the governmental action, the economic impact of the regulation, and whether the regulation interfered with reasonable investment backed expectations. See *Kaiser Aetna v. United States*, 444 *U.S.* 164, 175, 100 *S. Ct.* 383, ____, 62 *L. Ed.* 2d 332, 343 (1979); *accord Connolly v. Pension Benefit Guar. Corp.*, 475 *U.S.* 211, 224-25, 106 *S. Ct.* 1018, ____, 89 *L. Ed.* 2d 166, 178-

79 (1986); *Penn Central, supra*, 438 *U.S.* at 124, 98 *S. Ct.* at ____, 57 *L. Ed.* 2d at 648.

Before evaluating those critical factors in the context of the forfeiture condition, we observe preliminarily that Twin City's "takings" claim is somewhat incongruent with the Supreme Court's application of its regulatory "takings" doctrine. That application heretofore has been concentrated almost exclusively on governmental regulations restricting use of tangible property, usually some form of real estate, as opposed to regulations that interfere with or diminish only the profits of a business enterprise. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, No. 91-453, 1992 WL 142517 (U.S. June 29, 1992) (holding that State regulation barring all construction on barrier island residential lots constitutes taking requiring compensation unless common-law principles would have prohibited all habitable or productive improvements on lots); *City of Escondido, supra*, 503 *U.S.* ____, 112 *S. Ct.* 1522, 118 *L. Ed.* 2d 153 (holding that mobile-home rent-control ordinance was not physical "taking" under Fifth Amendment when viewed in context of California statute restricting termination of mobile-home park tenancy); *Nollan, supra*, 483 *U.S.* 825, 107 *S. Ct.* 3141, 97 *L. Ed.* 2d 677 (holding that condition of permit to construct residence requiring grant of public easement across beach-front section of private property constituted taking of property without just compensation); *First Lutheran Church v. Los Angeles County*, 482 *U.S.* 304, 107 *S. Ct.* 2378, 96 *L. Ed.* 2d 250 (1987) (holding that regulation completely depriving owner of property use entitles owner to compensation for period prior to determination that regulation was compensable "taking" under Fifth Amendment); *Hodel v. Irving*, 481 U.S. 704, 107 *S. Ct.* 2076, 95 *L. Ed.* 2d 668 (1987) (holding that federal statute barring inheritance of highly-fractionated Indian-land allotments and providing for escheat to tribe constituted taking of decedent's property without just compensation); *Keystone Coal v. DeBenedictis*, 480 *U.S.* 470, 107 *S. Ct.* 1232, 94 *L. Ed.* 2d 472 (1987) (holding that Pennsylvania statute restricting mining operations to prevent subsidence damage did

not constitute "taking" of property under Fifth Amendment); *Agins v. Tiburon*, 447 *U.S.* 255, 100 *S. Ct.* 2138 65 *L. Ed.* 2d 106 (1980) (holding that municipal zoning ordinances rezoning private residential property and allowing one to five single-family residences on five-acre tract did not constitute taking without just compensation); *Kaiser, supra*, 444 *U.S.* 164, 100 *S. Ct.* 383, 62 *L. Ed.* 2d 332 (1979) (holding that government's requirement of public access to marina joined to bay due to private development of inland lagoon constituted exercise of eminent-domain power, requiring payment of compensation); *Penn Central, supra*, 438 *U.S.* 104, 98 *S. Ct.* 2646, 57 *L. Ed.* 2d 631 (holding that application of New York City's Landmark Preservation Law, preventing use of air space above Grand Central terminal, did not constitute taking of private property without just compensation).

In a handful of cases involving regulatory "takings" of commercial property interests other than land, the Court generally has been reluctant to conclude that compensation was required. See *Connolly, supra*, 475 *U.S.* 211, 106 *S. Ct.* 1018, 89 *L. Ed.* 2d 166 (1987) (holding that provisions of federal law requiring that employer withdrawing from multi-employer pension plan pay proportionate share of plan's unfunded vested benefits in contravention of plan's contribution requirements did not constitute compensable taking; Court noted that government had taken nothing for its own use but had merely nullified contractual limitation by imposing additional obligations, consistent with congressional power, on withdrawing employers); *Ruckelshaus v. Monsanto Co.*, 467 *U.S.* 986, 104 *S. Ct.* 2862, 81 *L. Ed.* 2d 815 (1984) (holding that EPA's disclosure of post-1978 pesticide data did not constitute taking of property, although pesticide producer had property interest protected by takings clause of Fifth Amendment in health, safety, and environmental data submitted to federal government); *Andrus, supra*, 444 *U.S.* 51, 100 *S. Ct.* 318, 62 *L. Ed.* 2d 210 (holding that ban on sale of avian Indian relics existing before species of birds whose parts were used in relics became protected by federal law did not constitute compensable taking, noting that

owners retained right to possess, transport, donate, and devise affected property); *Miller v. Schoene*, 276 *U.S.* 272, 48 *S. Ct.* 246, 72 *L. Ed.* 568 (1928) (holding that Virginia statute requiring owner of ornamental cedar trees to destroy trees to avoid infecting adjacent apple orchards with cedar rust did not constitute compensable taking of property); *Hadacheck v. Sebastian*, 239 *U.S.* 394, 36 *S. Ct.* 143, 60 *L. Ed.* 348 (1915) (holding that municipal ordinance prohibiting brickmaking within designated area did not constitute compensable taking of property containing valuable clay deposits that could not feasibly be relocated to alternative site for brickmaking purposes); *Mugler v. Kansas*, 123 *U.S.* 623, 8 *S. Ct.* 273, 31 *L. Ed.* 205 (1887) (holding that Kansas statute prohibiting manufacture and sale of intoxicating liquors did not constitute compensable taking of claimant's brewery erected before statute was enacted); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 63 (1964) (proposing that economic losses imposed by government acting in its arbitral or regulatory capacity be treated as non-compensable exercise of police power); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 708 (1985) (observing that intent of drafters of "takings" clause was to limit application to physical takings).

Against that context of decisional law, we consider the specific factors generally emphasized in regulatory "takings" cases. We emphasize that application of those factors necessarily involves a balancing of the private interests affected by the regulation against the public interests that are advanced. See *Agins*, *supra*, 447 *U.S.* at 260-61, 100 *S. Ct.* at ____, 65 *L. Ed.* 2d at 112. We have already elaborated on the character of the governmental action, *supra* at ____-____ (slip op. at 21-24), noting that the forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger automobile market, as well as the State's interest in encouraging other multi-line carriers to continue in that market. The regulatory crisis in New Jersey's private-

passenger automobile-insurance market supports and enhances the reasonableness of and necessity for strong regulatory measures to promote market stability while the planned depopulation of the residual market is implemented.

The second factor, the economic impact of the regulation, emphasizes the potential significance of the financial loss that the Twin City affiliates may sustain if Twin City ceases to operate in New Jersey. We note preliminarily that because the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business, we have no occasion to consider application of those decisions involving real property that categorically find a compensable taking when a regulation "denies all economically beneficial or productive use of land." *See, e.g., Lucas, supra*, 1992 WL 142515 at *6. The record indicates that the affiliates' businesses generate aggregate annual premiums of $120 million and that those businesses are generally profitable, although no estimate of lost profits has been presented. The record does not indicate whether the affiliates could sell or otherwise receive compensation from other insurers interested in succeeding to lines of business written by one or more of Twin City's affiliates. We take for granted, however, that the surrender by Twin City's affiliates of their respective licenses would not necessarily result in the elimination of all commercial value inherent in the affiliates' New Jersey business operations, some aspects of which undoubtedly could be applied to business in other states. Nevertheless, we cannot speculate on whether, conceding the significant economic loss that the affiliates would sustain if forced to surrender their New Jersey markets, ITT Hartford would be able to recoup that loss by expanding its marketing efforts in other states with a less-restrictive regulatory climate. At least one commentator has noted that competition among state governments tends to prevent overregulation, offering companies choices in determining those States' regulatory systems to which it will subject its business operations. See Vicki Bean, *"Exit" as a Constraint on Land Use Exactions:*

*Rethinking the Unconstitutional Conditions Doctrine*, 91 *Colum. L. Rev.* 473, 508-09 (1991).

The third factor, whether the regulation interfered with reasonable investment-backed expectations, lends itself to either side of the argument. On the one hand, Twin City would undoubtedly acknowledge the strong, well-recognized governmental interest in regulating the business of insurance. See *Sheeran*, *supra*, 80 *N.J.* at 559. Moreover, the Appellate Division observed that Twin City and its investors

> had fair warning that the Legislature would link appellants' licenses to write other lines of insurance with their continuing to write private passenger automobile policies. In his 1987 veto message of Senate Committee Substitute for Senate Bill No. 2318 and Assembly Bill No. 2404, Governor Kean specifically called for legislation similar to Section 72:
>
> > We need to say to insurance companies that before they quit doing business in New Jersey in one line of insurance, they must be able to show that they are doing so for a good reason. If not, the Insurance Commissioner must have the power to require the company's licenses for all lines.
> >
> > * * * *
> >
> > The language that I am recommending to be added includes reasonable limits on the authority of the Insurance Commissioner to require the surrender of other licenses in the holding company system of the company wishing to withdraw from our State.
>
> [248 *N.J. Super.* 628-29.]

On the other hand, no such "linkage" had previously been imposed on affiliated companies writing insurance in different New Jersey markets, and to that extent the implementation of the forfeiture condition may not have been anticipated by Twin City.

On balance, we are fully satisfied, considering the specific factors ordinarily emphasized in regulatory "takings" analysis in the context of existing and developing "takings" jurisprudence, and weighing the compelling public interest against the private interests adversely affected, that no compensable taking of property under either the Federal or State Constitutions is implicated by the forfeiture condition. We consider that condition to be more in the nature of a regulatory limitation on Twin City's right to abandon its responsibilities in the private-passenger automobile market than a "taking" of its affiliates' property for public use. As in *Connolly*, *supra*, 475 *U.S.* at 224, 106 *S. Ct.* at ____, 89 *L. Ed.* 2d at 178, the State has taken none of the affiliates' businesses for its own use; rather, it has terminated the affiliates' authority to do business as a condition of Twin City's withdrawal. That Twin City's affiliates will lose profits because of the restriction imposed by the Commissioner does not give rise to a compensable taking of property, in view of our conclusion that the underlying regulation is valid. *Supra* at ____-____ (slip op. at 21-24). Moreover, we have already determined that the objective of the forfeiture condition is sufficiently related to the State's regulatory power to supervise Twin City's withdrawal from the market as to satisfy the enhanced standard set forth in *Nollan*, *supra*, 483 *U.S.* at 834 n.3, 103 *S. Ct.* at ____ n.3, 97 *L. Ed.* 2d at 688 n.3, that the "taking" substantially advance the State interest to be achieved. *Supra* at ____ (slip op. at 22). We also have carefully considered the public interest served by the forfeiture condition in the context of the economic impact of that condition on Twin City's affiliates and the extent to which it interferes with their investment-back expectations. Although the economic impact is potentially quite severe, we are thoroughly persuaded that the public interest advanced by the regulation substantially outweighs its adverse effect on ITT Hartford. Accordingly, we find no merit in Twin City's contention that the forfeiture condition imposes a compensable taking of its affiliates' property.

Finally, we address and reject the contention of *amicus*, American Insurance Association, that Section 72 of the Act and

the forfeiture condition imposed by the Commissioner's order violate the so-called "unconstitutional conditions" doctrine, relying on *Nollan*, *supra*, 483 *U.S.* 825, 107 *S. Ct.* 3141, 97 *L. Ed.* 2d 677. That doctrine holds generally "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1415 (1989). Prior to *Nollan*, the unconstitutional conditions doctrine was not generally identified with "takings" jurisprudence. See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 *Sup. Ct. Rev.* 1, 34-35 ("[*Nollan*] thus introduces, perhaps for a first time, the vexed doctrine of unconstitutional conditions into the law of eminent domain.").

However, the unconstitutional-conditions doctrine does not necessarily preclude the imposition of conditions on "the exercise of a constitutional right." *Id.* at 35; *see, e.g., Lyng v. International Union*, 485 *U.S.* 360, 108 *S. Ct.* 1184, 99 *L. Ed.* 2d 380 (1988) (holding that Federal statute providing that household otherwise eligible for food stamps cannot become participant in program or receive increased allotment if member of household is on strike because of labor dispute not an unconstitutional restriction of striker's rights under First and Fifth Amendments); *Maher v. Roe*. 432 *U.S.* 464, 97 *S. Ct.* 2376, 53 *L. Ed.* 2d 484 (1977) (upholding under Equal Protection Clause condition imposed by State welfare program that generally subsidized medical expenses incidental to pregnancy but limited benefits for first trimester abortions to those found "medically necessary"); *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 *F. Supp.* 280 (S.D.N.Y.) (upholding provision of presidential public financing law conditioning eligibility for public financing on compliance with spending limits, notwithstanding candidates' First Amendment right to make unlimited campaign expenditures), *aff'd*, 445 *U.S.* 955, 100 *S. Ct.* 1639, 64 *L.Ed.* 2d 231 (1980). Thus, the critical inquiry is "which conditions may be attached to what privileges and why." Epstein, *supra*, 1987 *Sup. Ct. Rev.* at 35.

We need not, however, explore the limits of the unconstitutional-conditions doctrine in view of our determination that the forfeiture condition is not otherwise unconstitutional, having heretofore concluded that that condition did not violate principles of due process, *supra* at ____-____ (slip op. at 21-24), equal protection, *supra* at ____ (slip op. at 26), or taking without just compensation, *supra* at ____-____ (slip op. at 27-37). Based on those determinations, we are satisfied that the unconstitutional-conditions doctrine is inapplicable to Twin City's contention that Section 72 of the Act and the forfeiture condition are invalid.

We affirm the judgment of the Appellate Division.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, O'Hern, and Garibaldi join in this opinion.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-114-90T5

# IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

Argued March 26, 1991 Decided June 11, 1991

Before Judges Brody, Gruccio and D'Annunzio.

On appeal from New Jersey Department of Insurance.

Wesley S. Caldwell, III, argued the cause for appellants Twin City Fire Insurance Company, *et al.* (LeBoeuf, Lamb, Leiby & MacRae, attorneys; Mr. Caldwell, of counsel and on the brief).

Jack M. Sabatino, Assistant Attorney General, argued the cause for respondent New Jersey Department of Insurance (Douglas S. Eakeley, Acting Attorney General, attorney; Mr. Sabatino, of counsel; Stephen P. Tasy and Carol Johnson, Deputy Attorneys General, on the brief).

Elmer M. Matthews argued the cause for *Amicus Curiae* American Insurance Association (Clapp & Eisenberg, attorneys; Mr. Matthews, Frederic S. Kessler and Harvey C. Kaish, on the brief).

The opinion of the court was delivered by

BRODY, J.A.D.

The Legislature enacted the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, c. 8 (Reform Act), to reduce the high cost of mandatory passenger automobile insurance. Among the strategies for accomplishing this goal, the Reform Act provides for phasing out what the Legislature identified as an unnecessary component of that high cost: maintaining the New Jersey Automobile Full Insurance Underwriting Association, commonly known as the Joint Underwriting Association or JUA. The JUA had been legislatively created with the expectation that it would be a fairer alternative to the assigned-risk plan that had provided insurance at higher premiums to drivers rejected by private passenger automobile insurers as bad risks. However, by the time the Reform Act was enacted in 1990, the JUA had amassed a debt of 3.3 billion dollars, despite subsidies derived from annual assessments on private passenger automobile insurance policies, and had accumulated a population of insureds numbering more than one-half of all New Jersey drivers.

The Reform Act provides for retiring the JUA debt by various means including assessing the New Jersey Property-Liability Guaranty Association 160 million dollars a year for seven years and imposing a 5% surtax on private passenger automobile insurance premiums, payable by the insurers, for three years. The Reform Act does not permit insurers to pass through to their policyholders the cost of either the assessments or the surtaxes.

The Reform Act also provides for replacing the JUA with the former assigned-risk plan for bad drivers, who will again pay higher premiums but whose numbers are to be limited to no more than 10% of all New Jersey drivers. This depopulation of the JUA and cap on the number of assigned risk drivers is to be accomplished over a two-year period by requiring private passenger automobile insurers to lower their standards for writing policies in the voluntary market. For a full history of the JUA and a description of the statutory program for shifting the bulk

of its drivers to the voluntary market *see I/M/O Assignment of Exposures to the Aetna Casualty and Surety Company*, ____ *N.J. Super.* ____, ____-____ (App. Div. 1991), slip op. at pp. 3-7 (May 20, 1991).

Some private passenger automobile insurers have sought to avoid the burdens of bailing out and depopulating the JUA by attacking the constitutionality of these statutory provisions and by attempting to withdraw from the New Jersey private passenger automobile insurance market. So far the Commissioner of Insurance has stymied insurers' attempts to withdraw from the market by invoking the provisions of Section 72 of the Reform Act, *N.J.S.A.* 17:33B-30 (hereafter Section 72), that are designed to discourage and delay withdrawal.

The Supreme Court has held that despite the statutory prohibition against passing through the cost of the assessments and surtaxes to their policyholders, insurers may nevertheless obtain relief in particular cases through the rate-making process in order to assure a constitutionally-required fair rate of return. *State Farm Mutual Insurance Co. v. State*, ____ *N.J.* ____ (1991) (May 16, 1991). This appeal is concerned solely with the constitutionality of Section 72 and the lawfulness of the Commissioner's implementation of its provisions respecting Twin City Fire Insurance Company and its affiliates in the ITT Hartford Group holding company (referred to collectively as appellants), all of whom are foreign insurers authorized to write insurance in New Jersey by *N.J.S.A.* 17B:23-1. Appellants' arguments are supported and augmented by the arguments of *amicus* American Insurance Association. Except as noted, we will not distinguish between the arguments of appellants and *amicus*.

Twin City writes about 1% of all New Jersey private passenger automobile policies. It also writes commercial vehicle insurance in this State. Its Hartford affiliates write substantial amounts of other lines of casualty and liability insurance in this State. A week before the Reform Act was enacted on March 12, 1990, Twin City attempted to surrender to the Commissioner its license to write private passenger automobile insurance in New Jersey and sought permission to issue nonrenewal notices to its

policyholders. The Commissioner, relying on the withdrawal provisions of Section 72, which include a provision rendering Section 72 retroactive to January 25, 1990, issued an order for orderly withdrawal containing several conditions that Twin City must meet before its withdrawal becomes effective.

Appellants object to four of the conditions, relevant portions of which appear in footnotes that follow. One condition requires Twin City to place its private passenger automobile policyholders with other insurers before issuing notices of nonrenewal. If Twin City is unsuccessful in making these placements within five years, it may then issue notices of nonrenewal. Its withdrawal from the market does not become effective until all its policies have expired.[1] A second condition simply makes it clear that Twin City, as a private passenger automobile insurer, must continue to comply with all insurance laws, including the JUA bailout and depopulation provisions of the Reform Act, until its withdrawal becomes effective.[2] A third

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1 The condition provides:

Twin City shall be required to seek for a period of no more than five years after the date of this Division and Order, a replacement carrier or carriers acceptable to the Commissioner for its New Jersey private passenger automobile insurance business. If Twin City is successful in placing all of its insureds with such other carriers prior to expiration of this five-year period, and if Twin City's New Jersey liabilities and potential liabilities [footnote omitted] have been fully satisfied prior to expiration of this five-year period, then Twin City's Certificate of Authority shall be surrendered and its authority to write business in New Jersey shall be terminated as of the date that these requirements have been fulfilled. If at the end of the five-year period, Twin City has not succeeded in finding replacement coverage for all of its insured, Twin City may nonrenew its remaining policies in-force as the policies expire.

2 The condition provides in relevant part:

[Twin City] shall comply with all other appropriate laws as amended by the FAIR Act which are not inconsistent with this Decision and Order, specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatory availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

condition requires Twin City to stop writing commercial vehicle insurance.[3] The fourth condition requires all other members of the ITT Hartford Group to stop writing the lines of insurance that they sell in New Jersey.[4]

The statutory authority for imposing these conditions is purportedly found in Section 72, which provides:

> An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an

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d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.* 17:33B-11 regarding residual market depopulation quotas and sharing of profits and losses related to residual market business.

3 The condition provides:

With respect to all of its other lines of business, Twin City shall be required to seek, for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner. Upon either placing all of its other business with an acceptable replacement carrier or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire.

4 The condition provides in relevant part:

All of Twin City's property and casualty and life and health affiliates within ITT Hartford Group, Inc. shall surrender their respective Certificates of Authority for amendment immediately upon approval of Twin City's plan, so the Department can limit and restrict the use of each affiliates's certificate to the . . . lines of insurance it currently writes in New Jersey. Twin City's property and casualty and life and health affiliates shall submit to the Commissioner for approval their respective Plans of Orderly Withdrawal within 60 days after receipt of the Decision and Order. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Those Plans of Withdrawal shall provide for the termination of the transaction of insurance business in New Jersey no later than five years from the date of approval of the plans of withdrawal by the Commissioner, as the affiliates' policies expire, after which time the Certificates of Twin City's affiliate companies will be indefinitely suspended. . . .

> orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policy holders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

We reject appellants' arguments that Section 72 is unconstitutional, and, with one exception, its arguments that the Commissioner unlawfully implemented Section 72 in this case.

I.

We turn first to the arguments that Section 72 is unconstitutional.

Before discussing each particular argument, we hold that the Section 72 provision that renders Twin City's affiliates subject to the Commissioner's order is not defective simply because the affiliates are separate corporate entities. Twin City has acknowledged that it and its affiliates are "under common management" of "the parent insurance company, Hartford Fire Insurance Company," which in turn is owned by the ITT Hartford Group. When considering whether the Legislature may constitutionally respond to a problem in the private passenger automobile insurance market by limiting appellants' business in other lines, it is not legally significant that appellants chose to write those other lines through separate corpo-

rate entities having common owners rather than writing all their lines through one corporate entity.

A.

Appellants' first argument is that by authorizing the Commissioner to bar Twin City and its affiliates from writing other lines of insurance as the price for permitting Twin City to withdraw from the private passenger automobile insurance market, Section 72 authorizes unconstitutional takings of property without just compensation. The Fifth Amendment of the United States Constitution and the New Jersey Constitution, *N.J. Const. of 1947*, art. I, para. 20, expressly provide that private property shall not be taken for public use without just compensation. "The protections afforded under both constitutions are coextensive." *Littman v. Gimello*, 115 *N.J.* 154, 161 (1989), *cert. denied*, ____ *U.S.* ____, 107 *L.Ed.* 2d 314 (1989).

Applied to this case, the constitutional prohibition raises questions of whether appellants' licenses to write other lines of insurance are private property and whether requiring appellants to choose between surrendering those licenses and writing private passenger automobile insurance constitutes a taking. We need not decide whether appellants' licenses to write other insurance are private property protected by the taking clauses because the choice given appellants by Section 72 does not constitute a "taking."

The United States Supreme Court has identified the factors that must be considered to determine whether a governmental regulation limiting the use of private property so destroys its value as to constitute a taking. There was no taking when the City of New York, in order to preserve Grand Central Station as a landmark, prohibited its owners from topping it with a high-rise office structure. *Penn Central Transp. Co. v. New York City*, 438 *U.S.* 104, 57 *L.Ed.* 2d 631 (1978), *reh'g denied* 439 *U.S.* 883, 58 *L.Ed.* 2d 198 (1978). That opinion requires us to make "essentially ad hoc, factual inquiries" involving factors of "particular significance":

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [Citation omitted.] So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [438 *U.S.* at 124.]

*Accord Connolly v. Pension Benefit Guaranty Corp.*, 475 *U.S.* 211, 224-225, 89 *L.Ed.* 2d 166, 179 (1986) (sustaining federal government's authority to compel employers to make additional contributions to a federal fund guaranteeing payment of private pension funds).

We first examine the character of the governmental action. Requiring appellants to discontinue writing all other lines of insurance as the price for discontinuing to write private passenger automobile insurance cannot be characterized as a "physical invasion." Rather it is part of "a public program adjusting the benefits and burdens of economic life to promote the public good."[5] Thus, as was the case in *Penn Central* and *Connolly*, the action may not "readily be found" to be a taking.

Appellants rely on *Nollan v. California Coastal Commission*, 483 *U.S.* 825, 97 *L.Ed.* 2d 677 (1987), where the Court found that there was a taking. The case is distinguishable because there the State's action was a physical invasion, the taking of a public easement over the owner's real property.[6] When the character of the governmental action "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v.*

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5 In our later consideration of the "due process" issue, we will discuss whether Section 72 does "promote the public good."

6 The facts of *Nolan* will be discussed below in more detail.

*Teleprompter Manhattan CATV Corp.*, 458 *U.S.* 419, 434-435, 73 *L.Ed.* 2d 868, 882 (1982) (New York City ordinance compelling landlords to allow cable T.V. hookups constitutes a physical invasion that was therefore a taking); *Kaiser Aetna v. United States*, 444 *U.S.* 164, 62 *L.Ed.* 2d 332 (1979) (government regulation compelling owner to allow public to use marina constitutes a physical invasion and was therefore a taking).

Appellants contend that the economic impact of having to give up writing other lines of insurance is the complete destruction of their other-lines business, which generated premiums of about 280 million dollars in 1989. We disagree. Section 72 does not require appellants to give up their other-lines business unless they choose to do so by voluntarily giving up their private passenger automobile line. Appellants' losses, if any, from choosing to continue to write private passenger automobile insurance, the choice Section 72 is designed to encourage, would be the reduction of profits that the JUA bailout and depopulation provisions of the Reform Act might cause. Such losses are not takings. The "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 *U.S.* 51, 66, 62 *L.Ed.* 2d 210, 223 (1979).

Appellants also claim that Section 72 "has interfered with distinct investment-backed expectations," a kind of economic impact identified by *Penn Central* as evidence of a taking. Their argument, however, does not go beyond complaining of the loss of their other-lines business. Interference with distinct investment-backed expectations does not occur whenever there is a loss of expected profits. *See State Farm Mutual*, *supra*, slip op. at pp. 16-18. It occurs only when the government has made a specific promise to induce investment in an enterprise and then later, after investments have been made in reliance on that promise, the government reneges.

For instance, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 81 *L.Ed.* 2d 815 (1984), federal law required Monsanto, a manufacturer of pesticides, to submit research data, developed at great expense, to a federal regulatory agency. The federal act

contained assurances that data submitted after 1972 would not be disclosed to competitors. A 1978 amendment limited the period of nondisclosure to ten years. The Court found that government disclosures of data submitted from 1972 to 1978 defeated Monsanto's reasonable investment-backed expectations and therefore constituted a taking. 467 *U.S.* at 1013, 81 *L.Ed.* 2d 839. However, the Court concluded that there were no takings before 1972 and after 1978 because, except for the period between those dates, the government had made no promise that the data would be kept secret.

Appellants do not claim that by enacting Section 72 the Legislature reneged on a prior promise, relied upon their investors, that appellants could freely leave the private passenger automobile insurance market while continuing to write other lines of insurance. On the contrary, for years appellants' investors knew that appellants were engaged in a heavily regulated business whose private passenger automobile insurance premiums were generally considered too high. Any significant statutory reform aimed at reducing those premiums would almost certainly contain provisions to discourage insurers from leaving the private passenger automobile insurance market.

More particularly, appellants' investors had fair warning that the Legislature would link appellants' licenses to write other lines of insurance with their continuing to write private passenger automobile policies. In his 1987 veto message of Senate Committee Substitute for Senate Bill No. 2318 and Assembly Bill No. 2404, Governor Kean specifically called for legislation similar to Section 72:

> We need to say to insurance companies that before they quit doing business in New Jersey in one line of insurance, they must be able to show that they are doing so for a good reason. If not, the Insurance Commissioner must have the power to require the company's licenses for all lines.
>
> * * * *
>
> The language that I am recommending to be added includes reasonable limits on the authority of the

> Insurance Commissioner to require the surrender of other licenses in the holding company system of the company wishing to withdraw from our State. . . .

The long-term regulatory environment in the pesticide industry prompted the *Monsanto* Court to determine that governmental disclosures of data submitted before 1972, when there were no governmental assurances of non-disclosure, did not constitute takings:

> . . . [A]bsent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest. [467 *U.S.* at 1008-1009, 81 *L.Ed.* 2d at 836]

We conclude that the provisions of Section 72 that authorize the Commissioner to require appellants to cease writing other lines of insurance if they choose to withdraw from the private passenger insurance market do not authorize an unconstitutional taking.

B.

Even though Section 72 does not have the effect of authorizing compensable takings, it does authorize the Commissioner to impose restrictions on appellants' business that will result in losses of their property. Appellants contend that those restrictions deprive them of property without due process.[7] We disagree.

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7 The United States Constitution provides in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law." *U.S. Const.* amend. XIV, § 1. Our Supreme Court follows the same standards developed by the United States Supreme Court under the federal

1.

Appellants first argue that the restrictions authorized by Section 72 are irrational and arbitrary. They premise the argument on a narrow view of Section 72's purpose. As they see it, the purpose of Section 72 is simply to ease the voluntary withdrawal of private passenger automobile insurers from the market. They argue from this premise that Section 72's provisions are irrational and arbitrary because they not only authorize the Commissioner to delay an insurer's withdrawal, but also authorize the Commissioner to require a withdrawing insurer to accept new business instead of shedding the business it has.

The purpose of Section 72, seen in the context of its place in the Reform Act, is obviously far broader. The Act itself identifies the Act's underlying purpose: to reduce the cost to the public of private passenger automobile insurance. "Not only has the cost of the insurance product itself escalated, but the subsidies that most drivers contribute to support the financially-troubled New Jersey Automobile Full Insurance Underwriting Association [JUA] have made the system a burden, rather than a benefit, to citizens of the State." *N.J.S.A.* 17:33B-2d. The overall means for correcting the problem are set forth in *N.J.S.A.* 17:33B-2h, which provides in relevant part:

> h. To that end, the Legislature declares that it is in the public interest to:
>
> * * * *
>
> (2) eliminate, over time, the current residual market mechanism, the New Jersey Automobile Full Insurance Underwriting Association, and certain market subsidies currently funding its losses;
>
> (3) provide, through the appointment of an insolvency trustee, for the orderly evaluation, prioritization and satisfaction of obligations payable on behalf of the association;

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Constitution for resolving due process claims under the New Jersey Constitution. ***State Farm Mutual, supra***, slip op. at p. 14.

(4) provide, through assessments on property-casualty insurers . . . for the funding of the debts and obligations of the association;

(5) create a new residual market mechanism in which insurers will share directly in the risk of insuring the "bad driver";

(6) guarantee that "good drivers" secure motor vehicle insurance coverage in the voluntary market and control the apportionment of drivers in the residual market; . . .

The Legislature has concluded that these objectives cannot be attained without the continued presence in the market of private passenger automobile insurers to carry a large part of the burden of bailing out and depopulating the JUA while continuing to provide mandatory insurance coverage to New Jersey drivers. As stated in Section 72, a private passenger automobile insurer's plan of withdrawal must provide "a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State." Thus the due process question is whether Section 72 strikes a rational balance between a private passenger automobile insurer's desire to withdraw from the market and the public's need for it to remain in the market to share the burden of bailing out and depopulating the JUA and to continue to provide coverage to its policyholders and other applicants.

Courts presume statutes to be constitutional and sparingly exercise the power to invalidate them. *Jordan v. Horsemen's Benevolent & Protective Ass'n.*, 90 *N.J.* 422, 433 (1982). To overcome the presumption of constitutionality, "the burden is on one complaining of a due process violation to establish if the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 *U.S.* 1, 15, 49 *L.Ed.* 2d 752, 766 (1976). *See also Hutton Park Gardens v. West Orange Town Council*, 68 *N.J.* 543, 562-565 (1975).

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and

> the right to conduct a business, or to pursue a calling, may be conditioned.

*Nebbia v. New York*, 291 *U.S.* 502, 527-528, 78 *L.Ed.* 940, 951-952 (1934). Generally, it is up to the Legislature, not the courts, "to decide whether a statute bears too heavily upon" a business and thereby violates due process. *Ferguson v. Skrupa*, 372 U.S. 726, 729, 10 *L.Ed.* 2d 93, 96 (1963).

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote a public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.

*Nebbia, supra*, 291 *U.S.* at 537, 78 *L.Ed.* at 957. *Accord Williamson v. Lee Optical of Oklahoma*, 348 *U.S.* 483, 99 *L.Ed.* 563 (1955).

Courts have been particularly circumspect when reviewing legislative regulation of the insurance industry because it affects the vital interests of the general public. "It is well established that the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare." *Sheeran v. Nationwide Mutual Ins. Co., Inc.*, 80 *N.J.* 548, 559 (1979). The principle that the Legislature has broad discretion in adopting police power regulations to promote what it sees as the public welfare "is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation.' " *California State Automobile Insurance Ass'n v. Maloney*, 341 *U.S.* 105, 109-110, 95 *L.Ed.* 788, 792 (1951). As summarized in a leading treatise:

> A state has the unquestioned power to regulate insurance companies and the method of conducting that kind of

> business. The business of insurance is considered not to be merely a private right, but a matter of public concern—a franchise subject to regulation by the state for the public good. And in such regulation, the legislatures are considered to have large powers and wide discretion.

19 *Appleman, Insurance Law and Practice*, § 10321 at 1-3 (1982).

Appellants essentially concede that it is rational for the Legislature to authorize the Commissioner to prevent the precipitous withdrawal of an automobile insurer from the market. It follows that the Commissioner may condition such withdrawal upon the insurer's placing its policyholders with other insurers, unless that cannot be accomplished within a reasonable period. The dispute on this point is whether five years is a reasonable period[8] and whether it is reasonable to require that until the insurer has withdrawn, it be required to write new business and otherwise comply with the provisions of the Reform Act to which automobile insurers staying in the market are subject.

As we previously noted, Section 72 authorizes the Commissioner to require that plans of withdrawal not only protect the insurer's "policyholders in this State" but also protect "the public generally." The Commissioner concluded that the public would suffer if Twin City does not continue to bear its share of the burden of bailing out and depopulating the JUA until the withdrawal becomes effective. The Commissioner found this to be

> necessary in order to provide for an orderly private passenger automobile insurance market over the next several years, during which time the transition to the market structure contemplated in the FAIR Act will occur. Requiring Twin City to accept its duties and obligations as any other private passenger automobile insurer will facil-

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8 The maximum period actually exceeds five years because at the expiration of that period the carrier is only authorized to send its policyholders notices of nonrenewal. The withdrawal is not effective until its policies have expired.

> itate that transition process. Any exemption for Twin City from these obligations would simply transfer them to other insurers, increasing their burdens and making the period of transition even more difficult.

It is neither irrational nor arbitrary to require an insurer to discharge the legal obligations imposed on competing insurers until such time as it withdraws from the market.

The five-year period is not irrationally long. Although it is not certain how long it will take the private passenger automobile insurance market to stabilize after discharging the JUA debt and assimilating its population, it is certain that the process could not go forward unless insurers remain in the market for years to absorb those burdens. We were told at oral argument that dozens of other insurers have applied for withdrawal. It is not for us to second-guess either the Legislature or the Commissioner as to the length of time that will be necessary to allow the process to run its course. *Dougherty v. Human Services Dept.*, 91 *N.J.* 1, 6 (1982).

We turn to anti-eviction legislation for an apt analogy. A landlord, the operator of a business providing a vital public service, may not withdraw his property from the rental market without giving substantial notice. For instance, in order to evict a senior citizen, the notice may be as long as 40 years. *N.J.S.A.* 2A:18-61.23. In upholding the constitutionality of that lengthy period, our Supreme Court identified the underlying legislative economic and social policy of protecting elderly tenants. The Court said, "Our cases have consistently affirmed the high degree of deference appropriate to evaluating the Legislature's chosen means of enhancing economic and social welfare." *Edgewater Inv. Associates v. Borough of Edgewater*, 103 *N.J.* 227, 235 (1986).

2.

It is neither irrational nor arbitrary to condition appellants' licenses to write other lines of insurance, including Twin City's license to write commercial vehicle insurance, on Twin City's continuing to write private passenger automobile insurance. In

reshaping its argument in terms of due process, *amicus* returns to *Nollan v. California Coastal Commission*, *supra*, 483 *U.S.* 825, 97 *L.Ed.* 2d 677, to argue that a state may not exact the surrender of a constitutional right as consideration for the favorable exercise of governmental discretion. The argument requires a closer look at the facts in *Nollan*.

Public beaches were on either side of the Nollans' beachfront property. They wanted to replace a small dilapidated bungalow on their property with a three-bedroom house. California required them to obtain a permit from the California Coastal Commission to erect the larger building. The Commission agreed to issue the permit only if the Nollans allowed the public to use their property to get from one of the public beaches to the other.

The Court held that conditioning the issuance of the permit on the Nollans' "agreeing" to let the public use their property was a thinly disguised public taking of an easement over their land. It acknowledged that if the Commission had exacted a concession from the Nollans more closely related to its authority to regulate the bulk of the proposed building, such a concession would not be a taking. However, because the "same governmental purpose" was not served by issuing the permit and exacting the easement, the Commission's conditional issuance of the permit was "an out-and-out plan of extortion" requiring that compensation be paid for the easement. *Id.* at 837, 97 *L.Ed.* 2d at 689, (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 *N.H.* 581, 584 (1981), *overruled on other grounds Town of Auburn v. McEvoy*, 553 *A.*2d 317 (1988)). In terms of due process, the holding is an example of the principle that a state "may not condition a privilege which it may deny altogether on a surrender of constitutional right." *Kutcher v. Newark Housing Authority*, 20 *N.J.* 181, 188-189 (1955). *Accord Frost v. California Railroad Comm'n*, 271 *U.S.* 583, 70 *L.Ed.* 1101 (1926).

*Amicus* likens the Commissioner's authority to regulate Twin City's withdrawal from the private passenger automobile insurance market to the California Coastal Commission's authority to regulate the size of the Nollans' house, and likens the

Commissioner's assertion of authority under Section 72 to compel appellants to stop writing other lines of insurance to the Coastal Commission's assertion of authority to exact an easement from the Nollans without paying just compensation. In effect *amicus* argues that even if the Commissioner's action is not a taking, it is nevertheless "an out-and-out plan of extortion" and therefore violates due process. However, neither *amicus* nor appellants have submitted authority to support their contention that an insurance carrier has a constitutional right to stop writing one of its lines because it has become less profitable, where that line is vital to the public welfare.

In sustaining the constitutionality of legislation that compels automobile insurers to renew policies, the Court in *Sheeran*, *supra*, said that the statute reflected "a clear legislative intent that companies which choose to write automobile policies in the state maintain their fair share of coverage." 80 *N.J.* at 557. Elsewhere, courts have sustained legislation compelling insurers to provide related coverage. *Health Ins. Ass'n of America v. Harnett*, 44 *N.Y.*2d 302, 376 *N.E.*2d 1280, 1284-1285, 405 *N.Y.S.*2d 634, 639 (1978) (health insurers must provide maternity coverage). *Cf.*, *New Hampshire-Vermont Health Service v. Whaland*, 119 *N.H.* 886, 410 *A.*2d 642 (1979) (statute compelling Blue Cross to provide insurance for mental disorders does not violate due process or commerce clause).

Appellants rely on a case that prohibits a state from requiring general liability insurers to write insurance covering medical malpractice claims. *Hartford Accident & Indemnity Co. v. Ingram*, 290 *N.C.* 457, 226 *S.E.*2d 498 (1976). The court held that the public need for such insurance does not justify conscripting insurers to enter a specialized field in which they have had no experience:

> While the State may, and does, require one desiring to engage in the business of writing insurance against liability for personal injury or property damage to obtain a license, the State may not, as a condition to the issuance such license, require the applicant to engage and carry on an entirely different kind of business.

226 *S.E.*2d at 507. The case does not help appellants because Section 72 merely seeks to encourage appellants to continue writing the line of private passenger automobile insurance that Twin City has been writing in New Jersey for years.

Appellants also rely on *People ex rel. Lewis v. Safeco Ins. Co.*, 98 *Misc.*2d 856, 414 *N.Y.S.*2d 823 (Sup. Ct. 1987), which held that insurers could not be denied permission to give up writing all their lines of insurance after sustaining continuing losses writing automobile insurance. The Court held that simply because insurance carriers had licenses to do business in a state "does not mean that they must be forever in bondage, subject to such control." *Id.* at 830. The case is distinguishable for two reasons. Here, appellants do not want to give up writing all lines of insurance and *State Farm Mutual*, *supra*, assures them a fair return.

We have found no case that has considered whether a state violates an insurer's constitutional right to due process by requiring it to surrender its license to write all lines of insurance if it chooses to stop writing private passenger automobile insurance. However, one court has held, albeit without elaboration, that a state may constitutionally suspend an insurer's license to sell profitable lines of insurance until it has complied with mandatory renewal requirements applicable to its line of automobile insurance. *Maryland Casualty Co. v. Commissioner of Ins.*, 372 *Mass.* 554, 363 *N.E.*2d 1087 (1977).

Although the precise issue before us is novel, it has been recognized that a state may constitutionally require the provider of a vital public service to provide that service to a part of its market, which, standing alone, is not profitable. *See e.g. Continental Air Lines, Inc. v. Dole*, 784 F.2d 1245, 1251 (5th Cir. 1986) (airline may be compelled to operate one small route at a loss for a limited period of time).

*Dictum* in *Penna. Reading S.S. Lines v. Bd. of Pub. Utility Com'rs*, 5 *N.J.* 114, 126 (1950), is also apt. The Court there held that the then Board of Public Utility Commissioners could not compel a railroad in financial straits to continue service on an unprofitable branch line that was little used and was paralleled by a well-used bus route:

> If the situation were such that the branch line was serving a real public need of passengers or the railroad as a whole was making a profit although this particular branch was operating at a loss, the problem would be an entirely different one; in either of these events, to order the railroad to continue service might not be arbitrary and unreasonable in view of all the circumstances. But here the branch line serves no public need for passenger service and not only the branch line but the entire railroad has been operating at a loss for a considerable number of years.

Here, writing private passenger automobile insurance is serving a real public need and neither appellants nor Twin City claims to be operating at a loss. We are satisfied that Section 72 does not overstep the constitutional bounds of due process by requiring appellants to continue to write less profitable private passenger automobile insurance as a condition to writing other more profitable lines of insurance.

3.

Appellants next argue that the retroactive feature of Section 72 denies them due process. It will be recalled that Twin City had submitted its application of withdrawal a week before the Reform Act became effective on March 12, 1990. Section 72 provides that it applies to any request for withdrawal "filed on or after January 25, 1990," the date that Governor Florio proposed the Reform Act to a joint session of the Legislature.

A statute may constitutionally be made retroactive, and "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 *U.S.* 717, 729, 81 *L.Ed.* 2d 601, 611 (1984). *See also Edgewater Inv. Associates v. Borough of Edgewater*, *supra*, 103 *N.J.* at 238. The retroactive feature of Section 72 serves the legitimate legislative purpose of preventing private passenger

automobile insurers from racing to withdraw from the market before the effective data of the Reform Act.

C.

We reject appellants' argument that Section 72 denies them the equal protection of the laws. *U.S. Const.* amend. XIV, § 1. They contend that Section 72 requires them to give up profitable lines of casualty insurance because they are unwilling to continue to write private passenger automobile insurance whereas no such penalty is imposed on casualty insurers not affiliated with private passenger automobile insurers. The distinction is obviously related to furthering a legitimate state interest. *New Orleans v. Dukes*, 427 *U.S.* 297, 303, 49 *L.Ed.* 2d 511, 516-517 (1976). The Legislature has reasonably chosen to support the private passenger automobile insurance market by inducing insurers already in that market to continue to write that line of insurance.

We need not consider whether the Legislature should have or legally could have supported the private passenger automobile insurance market by requiring casualty companies to write such insurance who were not already in that market. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *Ibid.* (upholding ordinance prohibiting vendors selling foodstuffs from pushcarts in the French Quarter, but exempting those vendors who have been selling in the French Quarter for eight years or more). *See also Ferguson v. Skrupa, supra*, 372 *U.S.* 726, 10 *L.Ed.* 2d 93 (upholding statute prohibiting anyone other than lawyers from engaging in the business of debt adjusting).

D.

We also reject the various arguments advanced by *amicus* that Section 72 violates the commerce clause. By enactment of the McCarran-Ferguson Act, 15 *U.S.C.S.* § 1011 *et seq.*,

Congress has expressly left to the states the regulation of the insurance business. Its purpose is to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 *U.S.* 408, 429, 90 *L.Ed.* 1342, 1360 (1946).

II.

In their final arguments, appellants challenge the action of the Commissioner on the grounds that he acted beyond the authority of Section 72, acted arbitrarily, capriciously, and unreasonably, and improperly acted through an adjudicatory process instead of through the adoption and application of regulations.

A.

The major complaint is that the Commissioner acted with an unreasonably heavy hand, and beyond his statutory authority, by compelling Twin City to continue to write private passenger automobile insurance for what may be more than five more years and also requiring appellants to give up writing other lines of insurance as the price for letting Twin City withdraw from the private passenger automobile insurance market.

In our prior discussion we sustained Section 72, including the authority it expressly and impliedly gives the Commissioner, as a reasonable implementation of a proper governmental purpose. For the same reasons we conclude that the Commissioner's actions were reasonable and therefore beyond our authority to overrule or modify. *N.J. Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562-563 (1978).

B.

The State concedes that in one respect the Commissioner overstepped the bounds of Section 72. That section limits the Commissioner's discretion to order surrender of certificates of

authority to write other lines of insurance to those "certificates of authority issued pursuant to chapter 17 or 32 of Title 17." The Commissioner's order for orderly withdrawal requires surrender of certificates of authority not only by ITT Hartford Group's "property and casualty" affiliates but also by its "life and health affiliates." The Commissioner exceeded his statutory authority because ITT Hartford Group's foreign life and health insurer affiliates are not licensed under Title 17 but under Title 17B, specifically *N.J.S.A.* 17B:23-1. Accordingly, the Commissioner has agreed to modify his order to eliminate from its coverage Hartford Life Insurance Company and Hartford Life and Accident Insurance Company.

C.

Whatever concerns we may have had as to whether the Commissioner should have proceeded under duly adopted regulations rather than through an individual adjudicatory process have been rendered moot by the Commissioner's adoption of comprehensive regulations on April 23, 1991, *N.J.A.C.* 11:2-29. We do not pass on the substance of the regulations, but we remand to give Twin City an opportunity to have its withdrawal application reconsidered by the Commissioner in light of the provisions of these new regulations. *See Home News Publishing Co. v. State*, 224 *N.J. Super.* 7, 13 (App. Div. 1988); *Department of Corrections v. McNeil*, 209 *N.J. Super.* 120, 125 (App. Div. 1986), *certif. denied* 104 *N.J.* 422 (1986); *K.P. v. Albanese*, 204 *N.J. Super.* 166, 180 (App. Div. 1985), *certif. denied* 102 *N.J.* 355 (1985). *Accord 613 Corp. v. State of N.J., Div. of State Lottery*, 210 *N.J. Super.* 485 (App. Div. 1986).

D.

We are satisfied from a careful review of this record that the other issues raised are clearly without merit and require no further discussion. *R.* 2:11-3(e)(1)(E).

Section 72 of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8, *N.J.S.A.* 17:33B-30, is sustained as con-

stitutional. The matter is remanded to permit the Commissioner to reconsider Twin City's application for withdrawal in light of the provisions of *N.J.A.C.* 11:2-29.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ [Illegible]
Clerk

NEW JERSEY STATUTES ANNOTATED
TITLE 17. CORPORATIONS AND INSTITUTIONS FOR FINANCE AND INSURANCE
SUBTITLE 3. INSURANCE
PART 1B. AUTOMOBILE INSURANCE REFORM
CHAPTER 33B. FAIR AUTOMOBILE INSURANCE REFORM ACT OF 1990
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## 17:33B-30. Foreign companies; surrender of certificate; plan for withdrawal

An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

Plan for Orderly Withdrawal
Submitted April 30, 1990

# Plan for Orderly Withdrawal of Twin City Fire Insurance Company as Personal Automobile Insurer in New Jersey

## INTRODUCTION

Twin City Fire Insurance Company ("Twin City") hereby submits its Plan for Orderly Withdrawal as a Personal Automobile Insurer in New Jersey ("Plan").

This Plan is limited to Twin City's New Jersey book of personal automobile insurance. The Plan is so limited because Twin City desires to minimize the effects of its license surrender on its New Jersey policyholders. This limitation, however, does not constitute a waiver by Twin City of any rights relating to the March 7 surrender of its entire Certificate of Authority, subject, of course, to a final determination in the action entitled *Jasper J. Jackson v. Twin City Fire Insurance Company*.

Twin City and its affiliates hereby request that the New Jersey Commissioner of Insurance (the "Commissioner") refrain from requiring (1) that Twin City surrender its Certificate of Authority in New Jersey to write lines of property and casualty insurance other than automobile insurance and (2) that any of Twin City's affiliates surrender their Certificates of Authority to write any lines of property and casualty insurance in New Jersey. With respect to Twin City, the basis for this request is that:

a.) Twin City's withdrawal as an automobile insurer will not cause a market availability problem or an undue disruption in the marketplace;

b.) Twin City's withdrawal will not adversely affect competition; and

c.) The public interest is best served by granting such a request because of the additional competition the company could provide in the homeowners and commercial insurance marketplace in New Jersey.

With respect to the affiliates of Twin City, this request is based upon the fact that Twin City has transferred all of its New Jersey business, other than its New Jersey personal auto insurance business, to various affiliated companies by a number of assumption/reinsurance agreements, effective January 1, 1990. (Copies of these assumption/reinsurance agreements are enclosed for the Commissioner's information. Exhibits A through D inclusive.) To date, these assumption/reinsurance agreements have *not* been put into effect, because of the temporary restraining order and preliminary injunction entered against Twin City by the New Jersey Superior Court. However, Twin City and its affiliates are prepared to implement these assumptions/reinsurance agreements with the consent of the New Jersey Department of Insurance and/or the New Jersey Superior Court. Accordingly, Twin City and its affiliates assert that Twin City's withdrawal as a personal auto insurer in New Jersey would have no negative impact on the residual markets for other lines of insurance, would cause no market availability problem or undue disruption in the marketplace, would not adversely affect competition with respect to other lines of insurance and, further, that the public intrest is best served by the granting of Twin City's request.

Twin City also requests that the Commissioner refrain from requiring any special deposits or performance bonds as security for performing its obligations and potential obligations in New Jersey. Twin City is a member insurance company of the group of insurance companies known as The Hartford Insurance Group. A number of Twin City's affiliates have been licensed in New Jersey for many years and, under this Plan, would continue to be licensed in New Jersey. Each of these affiliates is financially sound according to any applicable test. Based upon these circumstances, and based upon the further circumstances of Twin City's withdrawal, including but not limited to its relatively small share of New Jersey's personal

auto insurance market and the fact that its writing's in other lines of insurance in New Jersey will be continued in various affiliated companies, Twin City and its affiliates hereby request that the Commissioner refrain from requiring any such special deposit or performance bonds. If the Commissioner believes he needs any further assurance concerning the financial responsibility of Twin City or its affiliates, Twin City proposes that the Commissioner accept a resolution from the Board of Directors of Hartford Fire Insurance Company, Twin City's parent insurance company, affirming Hartford Fire Insurance Company's willingness to be financially responsible for Twin City during the period of Twin City's withdrawal and thereafter.

The information and data comprising Twin City's Plan is set forth below.

PLAN

A. 1. Twin City wishes to surrender its Certificate of Authority to write automobile insurance in New Jersey for the reasons set forth in its March 7, 1990 letter to the Honorable Jasper Jackson, Acting Commissioner of Insurance, a copy of which is attached hereto as Exhibit E and incorporated herein by reference.

The Statutory Financial Statement of Twin City for calendar years 1987, 1988 and 1989, documenting the company's financial condition for those three years, are enclosed as Exhibits F, G and H, respectively. Twin City is a participant in the Reinsurance Pooling Agreement ("Pooling Agreement") (Exhibit I) with other member companies of the Hartford Insurance Group. During the last three years (1987-1989), Twin City's surplus has increased from $60.3 million and, as of December 31, 1989, is $64.3 million. Twin City has had no unusual values for the NAIC IRIS tests during the last three years and has received a "Superior" rating from A. M. Best Company, one of the premier statutory rating organizations.

Also enclosed as Exhibits J, K and L, respectively, are the Certifications of Stephen L. Perreault and Michael H. Hughes and the Supplemental Certification of Stephen L. Perreault, all of which materials were additionally relied upon by Twin City in deciding to seek withdrawal.

2. The effective date of Twin City's withdrawal is May 1, 1990.

3. Twin City has held and continues to hold multiple line property casualty certificates of authority in all jurisdictions of the United States, including the District of Columbia. In each case, these certificates have been in effect for more than twenty (20) years.

Twin City has not withdrawn or sought to withdraw its certificate of authority in any jurisdiction other than New Jersey. It has not surrendered its certificate in any other jurisdiction, and no such certificate has been suspended or revoked. Further, Twin City currently has no plans to surrender its certificate of authority to do business in any jurisdiction other than New Jersey.

4. Schedule Y of Twin City's 1989 Statutory Financial Statement (Exhibit H) is an organizational chart showing the relationships among Twin City and its affiliates. This chart shows that Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company and that its affiliates writing property casualty insurance in New Jersey are also wholly-owned subsidiaries of Hartford Fire Insurance Company. Further information regarding Twin City and its property-casualty affiliates is as follows:

a. The lines of insurance which Twin City and each property casualty affiliate is licensed to write in New Jersey as follows:

| Company | Lines of Insurance Licensed |
|---|---|
| Twin City Fire Insurance Company | Multiple Lines |
| Hartford Fire Insurance Company | Multiple Lines |
| Hartford Accident & Indemnity Company | Multiple Lines |
| Hartford Casualty Insurance Company | Multiple Lines |
| Hartford Underwriters Insurance Company | Multiple Lines |
| Hartford Insurance Company of the Midwest | Multiple Lines |
| Hartford Insurance Company of Connecticut | Multiple Lines |
| New England Insurance Company | Multiple Lines |

b. Twin City and its affiliates operate under common management. The management is that of the parent insurance company, Hartford Fire Insurance Company.

c. The financial relationships among Twin City and its affiliates are as follows: Twin City participates in the Pooling Agreement with 15 other member companies of the Hartford Insurance Group.

d. The Marketing relationships among Twin City and its affiliates are as follows: Twin City and its Hartford, Connecticut headquartered affiliates market their insurance products and services collectively under the trade names "The Hartford," "The Hartford Insurance Group" and "ITT Hartford Insurance Group."

e. The agency relationships among Twin City and its affiliates are as follows: Twin City and its Hartford, Connecticut headquartered affiliates market their insurance products and services collectively through independent insurance agents who are generally appointed to represent all member insurance companies of The Hartford.

f. The claims handling among Twin City and its affiliates is handled as follows: Claims submitted to Twin City and its affiliates under policies issued by them are commonly handled by employees of Hartford Fire Insurance Company operating under management agreements

between Hartford Fire Insurance Company and its subsidiaries, including Twin City Fire Insurance Company.

5. During 1987, 1988 and 1989, Twin City wrote multiple lines of property casualty insurance in New Jersey. The details concerning these writings are shown in Exhibits M, N and O, respectively.

   Pursuant to Twin City's plan to surrender its New Jersey auto license only, neither Twin City nor any of its affiliates plans at this time to terminate any of their employees in New Jersey.

6. The address of each of Twin City's offices in New Jersey supporting its property casualty insurance operations is as follows:

   a.) Garden State Regional Office
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   b.) Involuntary Market Operations Center
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   c.) Morris County Full Service Claim Office
   333 Mount Hope Avenue
   Rockaway, New Jersey 07866

   d.) Red Bank Full Service Claim Office
   230 Half Mile Road
   Red Bank, New Jersey 077011

7. The form of non-renewal notice Twin City intends to sent to its policyholder is enclosed as Exhibit P. Each New Jersey personal auto policyholder will receive such a non-renewal notice. Pursuant to paragraph 8.1 below, Twin City proposes that, as each personal auto policy is renewed after the expiration of the six month period referred to therein, it will simultaneously issue its first notice of non-renewal. The second non-renewal notice will be sent at least sixty but not more than ninety days prior to the final policy expiration date.

Enclosed as Exhibit Q is a copy of the producer termination notice which Twin City intends to send to its producers.

8. The name and address of each open producer appointed by Twin City in New Jersey is shown in the enclosed Exhibit R(1). Exhibit R(2) shows the number of policies sold and the premium volume produced, by line of insurance, for the twelve month period ending December 31, 1989. The information in the latter exhibit is for open producers and closed producers electing renewal extension of servicing broker status.

9. Enclosed as Exhibits S and T, are specimen copies of Twin City's current standard Agency Agreement and Agency Agreement Declarations. Also enclosed as Exhibit U is a copy of Twin City's standard Servicing Broker Agreement.

10. Enclosed as Exhibit V is a copy of Dale R. Comey's March 8, 1990 letter on behalf of Twin City to Hartford Agents in New Jersey. The March 8 letter was rescinded by Mr. Comey on March 21, 1990 pursuant to the Order of the New Jersey Superior Court. Twin City intends to send a similar letter to its New Jersey agents as soon as the New Jersey Insurance Department has approved its Plan and/or as soon as it has the permission of the Superior Court. This correspondence will be in addition to any other correspondence to Twin City's producers and policyholders referred to elsewhere in this Plan.

11 Enclosed as Exhibits W to EE, inclusive, are copies of correspondence which Twin City intends to send to the following entities, to clarify its financial obligations with respect to such entities:

a.) Exhibit W is the letter Twin City intends to send to the Unsatisfied Claim Judgment Fund;

b.) Exhibit X is the letter Twin City intends to send to the New Jersey Property/Liability Guarantee Association;

c.) Exhibit Y is the letter Twin City intends to send to the New Jersey Automobile Insurance Risk Exchange Board;

d.) The Mutual Workers' Compensation Security Fund is not applicable to Twin City's withdrawal since Twin City is a stock company. Therefore, there is no letter enclosed for the Mutual Workers' Compensation Security Fund;

e.) Exhibit Z is the letter Twin City intends to send to the Stock Workers' Compensation Security Fund;

f.) Exhibit AA is the letter Twin City intends to send to the New Jersey Insurance Division of Fraud Prevention;

g.) Exhibit BB is the letter Twin City intends to send to the Commercial Automobile Insurance Plan;

h.) Exhibit CC is the letter Twin City intends to send to the New Jersey State Division of Taxation concerning its premium tax obligations;

i.) Since Twin City has been an admitted insurer in New Jersey, it need not send any correspondence to the Surplus Lines Guarantee Association. Therefore, no such letter is enclosed;

j.) The Medical Malpractice Reinsurance Association is in an inactive status; therefore, there is no letter to such association enclosed;

k.) Exhibit DD is the letter Twin City intends to send to The New Jersey Automobile Full Insurance Underwriting Association ("NJFIUA") concerning its examination assessments;

l.) Exhibit DD is also the letter Twin City intends to send to the NJFIUA concerning its residual market equalization charge and policy constant obligations to the state of New Jersey; and

m.) Exhibit EE is the letter Twin City intends to send to the Commissioner of Insurance concerning its obligations regarding financial examinations and other statutory fees.

12. Enclosed as Exhibit FF is a statement by Twin City, by line of insurance written, of all of its current incurred liabilities and reserves, including those incurred but not reported, in the State of New Jersey. This statement was developed and is certified by Albert J. Quirin, who is a duly authorized officer of Twin City and a Fellow of the Casualty Actuarial Society. The statement concerns itself with property casualty lines of insurance; since Twin City has not written life and health lines of insurance in New Jersey, no comparable statement for life and health lines is submitted herewith. Twin City's statement is as of March 31, 1990, which is a date not earlier than thirty days prior to the submission of this Plan.

13. Twin City intends to handle claims arising from its policies held by New Jersey residents, which policies remain in force after this Plan has been approved, in a manner fully consistent with its claim - handling activities prior to its withdrawal. It intends to meet its contractual obligations with respect to such claims and to follow its customary practices and applicable New Jersey statutes and regulations.

All such claims are reported to one of the two property and casualty field claim offices indicated in paragraph 6 above. Claims are handled, supervised and managed in such offices by a total staff of approximately ninety-six persons with limited support from outside adjusting facilities. Administrative management of these two field claim offices is provided by the claims headquarters office, located in the Garden State Regional Office. The staff in the Garden State Regional Office claim headquarters numbers approximately eighteen. The procedures for consumer contact will be those in place for Twin City prior to the commencement of its withdrawal.

14. There are no deposits of Twin City currently held by the Treasurer of the State of New Jersey.

15. Twin City has not assumed reinsurance.

16. Enclosed as Exhibit GG is a description of the national accounts of Twin City pursuant to which insurance has been provided for risks located in New Jersey. Since these accounts are all commercial insurance accounts, the withdrawal of Twin City from the personal auto insurance market in New Jersey will have little impact on the coverage provided to New Jersey risks covered under such national accounts. Coverage for such risks, including commercial auto coverage, will continue to be provided either directly or from other affiliates of Twin City pursuant to one or more of the assumption/reinsurance agreements referred to above.

17. With respect to Twin City's establishment of special deposits, or equivalent performance bonds, please refer to the opening paragraphs of this Plan, wherein Twin City requests that the Commissioner refrain from requiring such deposits or bonds.

18. Enclosed as Exhibit HH is a written certification from Anton A. Lubimir (the "Lubimir Certification"), a duly authorized officer of Twin City, signed under the pains and penalties of perjury, certifying that the information submitted in this Plan is accurate and complete to the best of his belief and is otherwise in compliance with applicable statutes and regulations.

19. Twin City proposes the following methods by which the Commissioner can verify Twin City's compliance with its obligations under this Plan:

    a.) Since Twin City's affiliates will retain their property casualty licenses in New Jersey, the Commissioner has authority pursuant to New Jersey law to examine the books and records of such companies at any reasonable time. Twin City and its affiliates will provide the Commissioner with prompt and reasonable access

to the records of Twin City and its affiliates relating to Twin City's withdrawal from New Jersey;

b.) Twin City will deem itself fully licensed in New Jersey during the period of its withdrawal and thereafter, for the purpose of allowing the Commissioner of Insurance reasonable and prompt access to its records for examination;

c.) Finally, Twin City and its affiliates will provide the Commissioner of Insurance with quarterly reports concerning the progress it is making under its Plan and its compliance therewith. Further, they will promptly and in good faith respond to individual inquiries from the Commissioner of Insurance and from policyholders and claimants and the legal representatives of both.

B.1. There is no express statutory authority requiring a minimum run-off period of one year or otherwise. Nevertheless, Twin City recognizes the advisability of a one year run-off period for renewal business. Twin City's proposed one year run-off period for renewal business is described below.

Twin City will seek to place its personal auto business with a replacement carrier in the voluntary market for a period of six months from the Commissioners' approval of its Plan or until all such personal auto insurance is replaced, whichever is sooner. Since Twin City issues only six-month policies in New Jersey, its proposal would provide for coverage for each policyholder for one additional policy period.

As each personal auto policy is renewed after the expiration of the six month period, Twin City will simultaneously issue its first notice of non-renewal to each of its then remaining policyholders. This notice will advise each recipient that coverage from Twin City will cease at the expiration of the then-renewing six-month policy. The second notice will be sent to each remaining policyholder

not less than 60, nor more than 90, days prior to the expiration of the six month period of coverage. Both non-renewal notices will comply in all relevant respects with the provisions of *N.J.A.C.* 11:3-8.2. In addition, in order to maximize the flexibility of its producers to procure replacement coverage, Twin City will process all mid-term cancellations on a pro-rata basis during the entire run-off period proposed.

2. Twin City hereby requests that the Commissioner exercise his discretion to permit Twin City to non-renew two (2) percent of its voluntary market policies in force in each territory at the end of a calendar year pursuant to *N.J.S.A.* 17:29C-7.1. Such non-renewals will be in addition to the non-renewals permitted by *N.J.A.C.* 11:3-8.3.

3. In making the request outlined in paragraph 2 above, Twin City acknowledges that the Commissioner has proposed that withdrawing companies not non-renew one policy for every two newly insured automobiles voluntarily written pursuant to *N.J.S.A.* 17:29C-7.1 on the basis that, once they implement a plan of orderly withdrawal, they are not issuing any new business in a fashion which is truly voluntary.

4. In view of paragraph 3 above, and consistent with the provisions of paragraph 3.e. of the Lubimir Certification, Twin City hereby specifically requests the Commissioner to waive the requirements of *N.J.S.A.* 17:30E-14 that it accept certain quotas of new business. Twin City requests such a waiver pursuant to *N.J.S.A.* 17:30E-14 (g) and for good cause shown. Twin City submits that good cause is shown for such request because it is inconsistent to require Twin City to "run off" its existing New Jersey personal auto business for a period of one year or more while, at the same time, requiring Twin City to accept, voluntarily or otherwise, new business applications for personal automobile insurance. On the same basis, Twin City also hereby requests the Commissioner to waive any other and further requirements existing at law or other-

wise that Twin City write new personal automobile insurance business in New Jersey during the period of its withdrawal.

5. Twin City does not now serve, nor has it ever served, as a servicing carrier in the New Jersey Automobile Full Insurance Underwriting Association.

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE

ORDER NO.: A90-151

IN THE MATTER OF THE "PLAN FOR ORDERLY WITHDRAWAL FROM NEW JERSEY" OF TWIN CITY FIRE INSURANCE COMPANY

ADMINISTRATIVE DECISION AND ORDER

This matter comes before the Commissioner of Insurance ("Commissioner") upon the filing by Twin City Fire Insurance Company ("Twin City") of a Plan for Orderly Withdrawal from the New Jersey Insurance Market, pursuant to the requirements of Section 7 of the Fair Automobile Insurance Reform Act of 1990, *L.* 1990, *c.* 8 Section 72 ("The FAIR Act"). For the reasons set forth in this Administrative Decision, Twin City's Plan for Orderly Withdrawal from New Jersey is approved, subject to certain substantial conditions.

I.

Introduction

Twin City is a property-casualty insurer admitted to transact business in this State pursuant to *N.J.S.A.* 17:32-1 *et seq.* (Twin City Certificate of Authority, copy attached). It is part of an insurance company holding system known as ITT Hartford Group, Inc. (Twin City Withdrawal Plan, page 2). Several other

companies in ITT Hartford Group, Inc. are licensed to write property/casualty insurance in New Jersey, including Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of Connecticut and New England Insurance Company. Two other subsidiaries, Hartford Life and Accident Insurance Company and Hartford Life Insurance Company write Life and Health Insurance in New Jersey (Twin City Withdrawal Plan, page 4). Hereinafter, these companies shall be referred to as the "affiliates". Management services for Twin City and its Affiliates are performed by the Hartford Fire Insurance Company. ITT Hartford Group, Inc. is the ultimate parent company of Twin City (Twin City Withdrawal Plan, Exhibit H, page 70).

Twin City primarily writes private passenger and commercial automobile insurance in New Jersey (Twin City Withdrawal Plan, Exhibit H, page 14). For private passenger automobile insurance its 1989 premium volume was $16.7 million covering 16,456 policyholders (Twin City Withdrawal Plan, Exhibit O), representing a 1.032% share of the private passenger automobile insurance market in this State (Twin City Withdrawal Plan, Exhibit O). For commercial automobile insurance, its 1989 premium volume was $49.6 million dollars, representing a 13% share of the commercial automobile insurance market (Twin City Withdrawal Plan, Exhibit O). In 1989 Twin City also wrote a small amount of homeowners insurance (Twin City Withdrawal Plan, Exhibit O). Through Twin City's affiliates, however, ITT Hartford Group, Inc. conducts substantial business in other lines of property/casualty insurance in this State (Affiliate 1989 Annual Statements, page 14, copies attached).

Twin City initially attempted to surrender its Certificate of Authority to the Department of Insurance ("the Department") without filing a Plan for Orderly Withdrawal as required by Section 72 of the FAIR Act. By letter dated March 7, 1990, Twin City forwarded its Certificate of Authority to the Department and simultaneously notified the Department of its intent to withdraw from the New Jerseys insurance market (Twin City Withdrawal Plan, Exhibit E). Acting Commissioner

Jasper Jackson returned Twin City's Certificate of Authority by letters dated March 8, 1990 (copy attached). In his letter, Acting Commissioner Jackson informed Twin City that its authority to write insurance in New Jersey would not be terminated until (a) Twin City filed a Plan for Orderly Withdrawal with the Department; (b) the Commissioner approved the Plan and (c) the Plan was fully implemented by Twin City (Jackson Letter dated March 8, 1990, copy attached). Acting Commissioner Jackson also forwarded to Twin City a copy of the Department's requirements and procedures for development of a Plan of Withdrawal.

By letter of counsel dated March 14, 1990, Twin City reiterated the position that its Certificate of Authority was effectively surrendered on March 7, 1990 and declined to submit a Plan of Orderly Withdrawal. Instead, counsel enclosed a copy of the Twin City's "Internal Program for Orderly Withdrawal." (Caldwell Letter dated March 14, 1990, copy attached). The Department responded by letter dated April 16, 1990, advising Twin City that its submission did not comply with the Department's Withdrawal procedures and requirements, and specifically listing its deficiencies (copy attached).

While these events were transpiring, Twin City notified 150 New Jersey producers of its intent to withdraw from the New Jersey market by letter dated March 8, 1990 (Twin City Withdrawal Plan, Exhibit V). Twin City also took action to nonrenew 3,000 of its automobile policies. The Department subsequently initiated an action in the Superior Court, Chancery Division, Mercer County entitled *Fortunato v. Twin City Fire Insurance Company, et al.*, (Docket No. 090-0037) alleging that Twin City's action violated Section 72 of the FAIR Act by failing to submit a Withdrawal Plan.

On March 15, 1990, the Honorable Samuel B. Lenox, A.J.S.C., issued a temporary restraining order which prevented Twin City from (a) surrendering its certificate of authority to write private passenger automobile insurance and other lines of insurance in New Jersey; (b) discontinuing the writing and renewal of private passenger automobile insurance and other lines of insurance in New Jersey, and (c) attempting, in any

manner or form, to effectuate a withdrawal form the private passenger automobile insurance and property/casualty markets in New Jersey, until such time as Twin City filed with and received approval for, from the Insurance Commissioner, a Plan for Orderly Withdrawal from the New Jersey market, and until such time as Twin City implemented the Plan of Withdrawal. (Order of Judge Lenox dated March 15, 1990, copy attached). On April 17, 1990, these temporary restraints were continued in the form of a preliminary injunction issued by the Honorable Paul G. Levy, J.S.C. (Order of Judge Levy dated April 17, 1990, copy attached). In addition, Twin City was ordered to immediately rescind its March 8, 1990 letter notifying its 150 New Jersey insurance producers of its intent to withdraw from the New Jersey market (Order of Judge Lenox). As a result of the court's decision, Twin City also ceased its efforts to nonrenew its automobile insurance policies, and further nullified its prior notice of nonrenewal on the 3,000 automobile insurance policies that had already been issued. (Letter of Dale Comey dated March 21, 1990, copy attached).

In the wake of the Court's decision, Twin City submitted a Plan for Orderly Withdrawal from New Jersey ("Plan") on April 30, 1990 (Letter of Dale Comey dated April 30, 1990, copy attached). The Plan contained a proposed effective date of May 1, 1990 (Letter of Dale Comey). Simultaneously with the submission of this Plan, Twin City again attempted to surrender its Certificate of Authority to the Department (Letter of Dale Comey).

By letter dated May 15, 1990, the Commissioner once more returned the Certificate of Authority to Twin City and informed Twin City that by law, such a surrender could only be effective upon approval and implementation of the Withdrawal Plan:

> Despite the fact that Twin City has filed a Plan of Withdrawal, I want to reiterate the Department's position that it cannot accept Twin City's submission of its Certificate of Authority to the Department. This fact was conveyed to you by Deputy Commissioner Jackson on March 8, 1990. Furthermore, under Section 72 of the

> FAIR Insurance Reform Act of 1990, which was enacted on March 12, 1990, I am expressly precluded from accepting any company's Certificate of Authority either for amendment or, in the alternative, surrender until I have approved an Orderly Plan of Withdrawal and the company has complied with that approved Plan. Therefore, I am returning herewith that Certificate to you. {(Letter of Commissioner Fortunato at page 2 (May 15, 1990)}.

The Commissioner further advised Twin City that inasmuch as its Plan was only submitted on April 30, 1990, it would not be possible to approve the Plan within 24 hours, for an effective date of May 1, 1990:

> Because Twin City's Plan was submitted on April 30, 1990, it was impossible for the Department to review and approve it by May 1, 1990, as you requested. As you no doubt appreciate, a withdrawal review requires the input of the various Divisions of the Department. Such a review is difficult to accomplish in a week, let alone 24 hours.
>
> However, I want to assure you that the Department staff will process the Plan as expeditiously as possible. That is, after my staff has reviewed the Plan for completeness, you will be advised if there are any deficiencies in the submission which must be cured. Once the Plan is determined to be complete (that is, all deficiencies, if any, have been satisfied), it will be reviewed by the appropriate Department staff and then presented to me along with recommendations for my consideration. {Letter of Commissioner Fortunato at page 1 (May 15, 1990)}.

Finally, the Commissioner indicated to Twin City that Section 72 of the FAIR Act required him to consider whether some or all of the Certificates of Authority of Twin City's Affiliate insurers within the ITT Hartford holding company system should also be surrendered as part of Twin City's withdrawal. He therefore directed Twin City to submit to the Department a certified statement listing "all of the Certificates of Authority held by all of the companies in New Jersey within

the Hartford Group holding company system, specifying the lines of business as well as the volume of premium written in each line." (Letter of Commissioner Fortunato dated May 15, 1990, at page 2).

On June 7, 1990, Assistant Insurance Commissioner John Conover wrote to Twin City to advise that the Department had completed its initial review of its Withdrawal Plan (Conover letter dated June 7, 1990, copy attached). Assistant Commissioner Conover informed Twin City that this initial review had revealed a number of areas of material concern where additional information would be of assistance to the Department in expediting its review of the Twin City Plan (Conover letter). Accordingly, the Assistant Commissioner requested that Twin City submit the following information:

(1) An Amendment to the Plan to include commercial automobile and homeowners lines of insurance scheduled to be transferred to Twin City affiliates.

(2) Information pertaining to Twin City's life/health affiliates, in addition to the information already received pertaining to its property/casualty affiliates.

(3) Additional information pertaining to the number of private passenger automobiles insured in New Jersey during 1987, 1988 and 1989 to correspond to the number of Twin City policies in force during those years.

(4) Additional information necessary to enable the Department to verify the accuracy of Twin City's stated incurred liabilities and reserves.

(5) Additional information regarding Twin City's plans for its commercial areas of automobile insurance. (Conover Letter).

The supplemental information requested by the Department was submitted by Twin City on June 14 and 19, 1990 (Murray and Lubimir Letters, copies attached).

## II.

## Twin City's Withdrawal Plan

Twin City's Plan proposes to withdraw only its private passenger automobile insurance in New Jersey by nonrenewing the policies and withdrawing its rating system (Twin City Withdrawal Plan, pages 1 and 9). To enable it to continue writing its other lines in New Jersey, Twin City has requested that the Commissioner ". . . refrain from requiring (1) that Twin City surrender its Certificate of Authority . . . and (2) that any of Twin City's affiliates surrender their Certificates of Authority to write lines of property and casualty insurance in New Jersey." (Twin City Withdrawal Plan, page 1). In the event the Commissioner requires Twin City to surrender its Certificate of Authority it offers to transfer (through assumption of reinsurance agreements) all of its other in-force business to its affiliates (Letter of Wesley Caldwell dated June 14, 1990, copy attached).

In correspondence with the Department, Twin City's affiliates have also proposed to eliminate their rating systems for private passenger automobile insurance in New Jersey (Letter of William Murray dated May 4, 1990, copy attached.)[1] It is clear from this correspondence that ITT Hartford Group, Inc. as a whole wishes to exit the private passenger automobile insurance market in New Jersey. The only exception to this proposed general withdrawal is an automobile and homeowners insurance program operated by Hartford Underwriters Insurance Company limited to members of the American Association of Retired Persons (AARP) (Letter of Kevin Kupec dated June 19, 1990, copy attached).

Twin City offers several reasons for its withdrawal in Exhibit E of the Plan, all of which relate to the FAIR Act's projected impact on operations (Twin City Plan, Exhibit E). Specifically,

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1 The Twin City affiliates affected by the proposed suspension of automobile insurance rating systems include Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of Connecticut and Hartford Insurance Company of the Midwest (Murray Letter).

it mentions the Act's elimination of certain rating factors, and its surtaxes and assessments to fund the residual market deficit under the FAIR Act (Twin City Withdrawal Plan, Exhibit E). In addition, Twin City includes a forecast of underwriting losses due to allegedly inadequate rates (Twin City Withdrawal Plan, Exhibit E). Twin City received a rate increase of 14.4% effective August 1, 1988 but has not requested or received a rate increase since that date (Memorandum of Richard Boer dated June 6, 1990, copy attached).

Twin City proposed in its Plan to seek a replacement carrier for its personal automobile insurance business for a period of six months after the date of Plan approval or until all of the policies are replaced, whichever is sooner (Twin City Withdrawal Plan, page 9). After the expiration of the six months the policyholder will receive a non-renewal notice that coverage will cease at the expiration of the then-renewed six-month term (Twin City Withdrawal Plan, page 9). A second notice of non-renewal would be mailed to each remaining policyholder not less than 60 nor more than 90 days prior to the termination of the six month period of coverage in compliance with *N.J.A.C.* 11:3-8.2 (Twin City Withdrawal Plan, page 9).

## III.

## The Impact of Twin City's Withdrawal Upon the New Jersey Insurance Market

The New Jersey private passenger automobile insurance market presently is undergoing a period of transition and adjustment in the wake of the enactment of the FAIR Act on March 12, 1990. That Act implements certain reforms in New Jersey's automobile insurance law, the impact of which cannot fully be assessed until several years have elapsed. For example, Section 20 of the FAIR Act contemplates an initial shifting of 60% of insureds currently in the residual market from that market to the voluntary market as part of the depopulation of the New Jersey Automobile Full Insurance Underwriting Association ("JUA"). Ultimately, all but a very small percentage of the

insureds currently assigned to the JUA must be absorbed by the voluntary market. Simultaneously, Section 25 of the FAIR Act creates a new definition of "eligible persons" for whom insurers in the voluntary market are obligated to provide coverage. In addition, Section 56 of the FAIR Act imposes certain cost saving measures by requiring insurers to implement procedures for the control of fraudulent practices within the industry. Finally, Section 69 of the Act implements changes in the ratemaking process by prohibiting insurers from using the services of rating organizations for ratemaking purposes. In sum, the FAIR Act has created a climate of change within the private passenger automobile insurance market in New Jersey. It will be a number of years before the full impact of these and many other FAIR Act reforms can be fully assessed.

Given this climate of change, a precipitous withdrawal by Twin City from the New Jersey marketplace will create a disruption in market stability. If Twin City leaves the New Jersey marketplace suddenly, the burden of insuring its current book of 16,456 policyholders will fall immediately upon the remaining automobile insurers in New Jersey. In order to lessen this burden upon those insurers and in order to abate the sudden shock to the market resulting from an abrupt withdrawal by Twin City, I find that it is necessary to implement Twin City's withdrawal gradually as replacement carriers are found, to provide the voluntary market with sufficient opportunity to absorb Twin City's book of business while simultaneously adjusting to the reforms imposed by the FAIR Act.

## IV.

## The Department's Determination

For the reasons set forth below, I find that Twin City's withdrawal from the private passenger automobile insurance market in New Jersey should be approved. However, I find that the Plan of Withdrawal submitted by Twin City requires certain substantial modifications necessary to protect the interests of the insured public and to maintain the stability of the New

Jersey insurance market. I therefore approve the Plan, subject to the following substantial conditions:

1. *First Condition*: Twin City's Certificate of Authority shall be amended immediately upon approval of the Plan to limit and restrict its use to the lines of insurance currently underwritten. The Certificate shall be surrendered and Twin City's authority to write business in this State shall be terminated only when Twin City's New Jersey liabilities and potential liabilities have been fully satisfied and no longer exist.

*Discussion*: Continuation of the Certificate of Authority is necessary during the implementation of the Plan because Twin City must perform various underwriting, claims and administrative activities which constitute transacting the business of insurance within this State pursuant to *N.J.S.A.* 17:32-19. In addition, Section 72 of the FAIR Act requires that "The Certificate of Authority of the company shall be deemed to continue in effect until the provisions of the plan have been carried out."

2. *Second Condition*: Within 30 days after its receipt of this Decision and Order, Twin City shall apply to the Governing Committee of the Commercial Automobile Insurance Plan ("CAIP") to initiate an expeditious and orderly termination as a CAIP servicing carrier.[2]

3. *Third Condition*: Twin City shall be required to seek for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner for its New Jersey private passenger automobile insurance business. If Twin City is successful in

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2 CAIP is a program established by the Commissioner pursuant to *N.J.S.A.* 17:29D-1 to assist New Jersey insureds in obtaining commercial automobile insurance. The statute, in its form prior to amendment by the FAIR Act, authorized the Commissioner to "adopt, issue and promulgate rules and regulations establishing a plan for the providing and apportionment of insurance coverage for applicants therefore who are in good faith entitled to, but are unable to procure the same through ordinary method." *N.J.S.A.* 17:29D-1. The statue required all insurers transacting business in New Jersey to participate in the Plan. Twin City is a servicing carrier in CAIP.

placing all of its insureds with such other carriers prior to the expiration of this five-year period, and if Twin City's New Jersey liabilities and potential liabilities[3] have been fully satisfied prior to expiration of this five-year period, then Twin City's Certificate of Authority shall be surrendered and its authority to write business in New Jersey shall be terminated as of the date that these requirements have been fulfilled. If at the end of the five-year period, Twin City has not succeeded finding replacement coverage for all of its insureds, Twin City may nonrenew its remaining policies in-force as the policies expire.

4. *Fourth Condition*: With respect to all of its other lines of business, Twin City shall be required to seek, for a period of no more than five years after the date of this Decision and Order, a replacement carrier or carriers acceptable to the Commissioner. Upon either placing all of its other business with an acceptable replacement carrier or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire.

*Discussion*: I find that a five-year period for the procurement of replacement coverage on Twin City's private passenger automobile book of business is a reasonably sufficient period of time to accomplish the goal, discussed in section III of this Decision and Order, of providing the voluntary market with sufficient opportunity to absorb Twin City's book of business while simultaneously adjusting to the reforms imposed by the FAIR Act. I further find that a five-year period for the procurement of replacement coverage on Twin City's other lines

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3 "Liabilities" are defined as the total losses and loss adjustment expenses arising from Twin City's current book of business as actually reflected by its financial records. The term "loss" is defined as "the basis for a claim for indemnity or damages under the terms of an insurance policy." The term "loss adjustment expense" is defined as expense "involved in the adjusting of losses—Adjuster's fees—Court costs—lawyer's fees, etc." Davids, Lewis E., *Dictionary of Insurance* (Littlefield, Adams & Co. 1970). Potential liabilities are those liabilities which have not yet been incurred but which may reasonably be foreseen to develop from Twin City's current book of business.

of business (*e.g.*, commercial automobile and homeowners coverage) is appropriate because, as reflected in Twin City's Annual Statements for the years 1987, 1988 and 1989, those other lines of coverage have historically been very profitable for Twin City and can certainly be placed with other carriers by the end of the five-year period, if not sooner. If developments in subsequent years indicate that the market can absorb Twin City's books of business, and adjust to the FAIR Act reforms more rapidly than the respective five year time frames contemplated by this Decision and Order, Twin City may apply to the Department for reconsideration of these time frames.

It should also be noted that there are 32 other pending requests for withdrawal that have been submitted to the Department since the FAIR Act was adopted. It is therefore essential for the future viability of the New Jersey private passenger automobile insurance marketplace that financially sound insurers like Twin City, which have historically profited from New Jersey business, be prevented from leaving the New Jersey market in a hasty or disorderly manner. Until the Department has an opportunity to assess the impact of all withdrawal applications upon the New Jersey market, protection of the public interest requires that companies not be permitted to accomplish quick withdrawals. While a withdrawal by any one company may have a limited impact, withdrawal by other companies may well have a large impact upon the market. Given these circumstances, I find that the most prudent course of conduct, at this time, is to require that the process of withdrawal be implemented gradually. Twin City's withdrawal cannot be considered in a vacuum, but must be viewed in terms of the impact that multiple withdrawals will have upon the New Jersey market.

5. *Fifth Condition*: All of Twin City's property and casualty and life and health affiliates within ITT Hartford Group, Inc. shall surrender their respective Certificates of Authority for amendment immediately upon approval of Twin City's plan, so the Department can limit and restrict the use of each affiliates's certificate to the property and casualty and life and health lines of insurance it currently writes in New Jersey. Twin City's

property and casualty and life and health affiliates shall submit to the Commissioner for approval their respective Plans of Orderly Withdrawal within 60 days after receipt of this Decision and Order. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Those Plans of Withdrawal shall provide for the termination of the transaction of insurance business in New Jersey no later than five years from the date of approval of the plans of withdrawal by the Commissioner, as the affiliates' policies expire, after which time the Certificates of Twin City's affiliate companies will be indefinitely suspended. With regard to the life and health lines of insurance written by the affiliates, the terms of the Withdrawal Plan shall not encompass those life/health policies which are noncancellable by operation of law. The affiliates shall retain limited authority to continue the servicing and renewal of such policies.

*Discussion*: Section 72 of the FAIR Act requires a foreign insurer admitted in this State to submit for approval its Plan of Orderly Withdrawal. The statute further provides that: "In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other Certificates of Authority issued pursuant to Chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered." This statute requires the Commissioner to consider whether requiring affiliates to surrender their Certificates of Authority is appropriate under the circumstances. Twin City seeks a waiver of this provision, and requests that the Certificates of its affiliates not be affected. I choose not to grant the waiver, but to require that Twin City's affiliates likewise withdraw from doing business in New Jersey. I do so for several compelling reasons.

The business of insurance in New Jersey is a highly regulated business. In particular, automobile insurers must accept regulation as the necessary price for the guaranteed stable mar-

ket which results from this State's mandatory automobile insurance laws. Controls over market entry and exit are essential parts of the regulatory scheme provided by statute. Just as the regulatory scheme restricts nonrenewal of individual insurance policies by specifying allowable limited reasons for nonrenewal, it also empowers the Commissioner to exercise control over nonrenewal of large blocks of business. These controls include the Commissioner's authority to provide disincentives to large block nonrenewals by requiring the insurer seeking to nonrenew such business to cease writing other lines of business that may at a particular time be perceived as more profitable. Furthermore, since an insurer may, for its own purpose, choose to operate through a holding company system of affiliated companies, effective regulation of an Insurer necessarily includes the power to control the activities of affiliates. The instant case presents an appropriate context for the exercise of both of these powers.

In denying the requested waiver it should be noted that circumstances which would mitigate in favor of a waiver do not exist.

First, the withdrawal of Twin City from the private passenger automobile insurance business may be expected to have a negative impact on the residual market and exacerbate market availability problems in the future. All insurers transacting private passenger automobile business in New Jersey are required to absorb business from the residual market resulting from the depopulation and elimination of the JUA. This requirement is part of an overall plan of reform implemented by the FAIR Act in which various groups in society, including but not limited to automobile owners, insurers, attorneys, doctors and the State government, must work together to resolve what unquestionably has become a severe crisis in automobile insurance in this State. By applying for Twin City's withdrawal from New Jersey, Twin City and its parent ITT Hartford Group seek to avoid their share of this obligation, thereby increasing the obligation of their fellow insurers in the New Jersey market. At the same time however, Twin City and ITT Hartford Group seek to enjoy the benefits derived from transaction of business in New

Jersey on other highly profitable lines of insurance (*e.g.*, commercial automobile insurance homeowners insurance, life insurance and accident and health insurance). This result is inequitable. If Twin City and its parent desire to continue to enjoy the benefits of their more profitable operations in this State, they must be prepared to meet the statutory obligations which accompany that privilege. If Twin City and its parent do not wish to bear those statutory obligations they cannot reasonably expect to continue to exercise their statutorily conferred privilege to do business in this State by dumping what they perceive to be allegedly unprofitable business on the market while simultaneously maintaining profitable lines of business either at Twin City or any other affiliated insurer of ITT Hartford Group.

In reaching this conclusion, I emphasize that I make no finding here that Twin City's private passenger automobile book of business is unprofitable. Indeed, a review of Twin City's Annual Statements for the years 1988 and 1989 indicates that on a national basis, its private passenger automobile lines have historically been profitable (Annual Statements for 1988 and 1989, Insurance Expense Exhibit).

Moreover, given Twin City's historic record of profitability in this area it is likely that it would continue in the future to realize a profit on its automobile book of business, even when the reforms imposed by the FAIR Act are taken into consideration. I find only that Twin City's Withdrawal from the New Jersey market is motivated by its perception that its automobile book of business will become unprofitable by virtue of the enactment of the FAIR Act (Plan at Exhibit E), which perception I further find to be wholly unfounded.

Second, the reasons advanced by Twin City for its actions to withdraw are based upon the duties and obligations to be undertaken by all New Jersey private passenger automobile insurers arising from the FAIR Act. Twin City has indicated that a prime motivation for its withdrawal is its perception that the FAIR Act will adversely impact upon its profitability in the future (Twin City Withdrawal Plan, Exhibit E). In adopting this position, Twin City ignores the fact that it remains at all times

free to apply to the Commissioner for an increase in its rates pursuant to *N.J.S.A.* 17:29A-14 and to avail itself of an annual flex rate increase pursuant to *N.J.S.A.* 17:29A-44. I note in passing that Twin City has not applied for a prior approval rate increase since 1988, nor has it availed itself of a flex rate increase for the years 1989 and 1990 (Boer letter of June 6, 1990). Instead, Twin City and ITT Hartford Group have chosen to ignore the avenues for rate relief available to them in favor of the more drastic alternative of withdrawal. Having failed to address the question of Twin City's profitability through well established ratemaking procedures in this State, ITT Hartford Group should not be permitted to achieve profitability for its subsidiaries by shifting Twin City's profitable lines to those subsidiaries and by dumping Twin City's automobile book of business on the New Jersey market.

Third, it should be noted that the withdrawal is not due to the hazardous financial conditions of Twin City or other specific problems affecting its solvency (Twin City Withdrawal Plan, Exhibits F, G and H).

Fourth, unlike the withdrawal of John Hancock Insurance Company from the New Jersey market, which was approved by the Department as part of a national plan to cease writing property-casualty insurance, Twin City's withdrawal from private passenger automobile insurance is limited to New Jersey. It is not part of an overall plan of withdrawal in other jurisdictions as part of a corporate restructuring (Twin City Withdrawal Plan, page 1).

Finally, there appears to be no compelling public interest that would be served by granting the waiver and permitting the affiliates to continue to transact other lines of business in New Jersey. The lines of business offered by the affiliates are not unique to those affiliates but can be provided by other insurers in the market. The New Jersey public will therefore not be deprived of any opportunity to obtain any unique or unusual type of coverage if the affiliates no longer do business in New Jersey.

Twin City's Plan contains a proposal to transfer its more profitable lines to its Hartford Group affiliates, while nonre-

newing only its allegedly unprofitable private passenger automobile insurance business. This proposal is contrary to the interest of the New Jersey insurance-buying public. Furthermore, any attempt by Twin City or ITT Hartford Group to establish a new corporation for purposes of absorbing what Twin City believes to be its profitable lines of business would also be unacceptable.

The continuation of the business of writing of writing private passenger automobile insurance in New Jersey at this particular time is especially and uniquely in the public interest. Requiring Twin City's affiliates to withdraw from other lines leaves those lines of business for other insurers and is likely to encourage the remaining insurers to continue writing private passenger automobile business in New Jersey. Other insurers committed to remaining in New Jersey will be able to boost their own profitability by absorbing the profitable nonautomobile lines of business which Twin City's affiliates will leave behind. Generally, these other lines of business, such as homeowners insurance, commercial automobile insurance, commercial property liability insurance, life insurance, accident and health insurance, inland marine insurance, fire insurance, allied lines and farmowners insurance, are very profitable, as reflected by the overall operating ratios in these areas. *Best's Aggregates and Averages, Property-Casualty* (1989 edition) at pages 189, 192, 194, 199 and 204. Accordingly, these lines of insurance are highly attractive to insurers. Furthermore, the approach which I adopt here provides an incentive for new insurers willing to write all lines to enter the New Jersey marketplace. It is appropriate, however, to permit Twin City's affiliates to continue to write these other lines for a limited period of five years, so as to provide an opportunity to prepare for the total cessation of business.

In reaching the determination to require surrender of the Certificates of Authority of Twin City's affiliates, I have been guided by my concern that the shifting of more profitable lines of business to Twin City's affiliates and the simultaneous dumping of its automobile business would create a serious disruption in the private passenger automobile insurance market

in New Jersey. I note that the New Jersey Supreme Court has expressed precisely this same concern in *Sheeran v. Nationwide Mutual Insurance Company, Inc.* 80 *N.J.* 548 (1979). *Sheeran* involved an attempt by an insurer to withdraw from its fire and casualty insurance lines of business in New Jersey. The insurer challenged certain Insurance Department regulations, promulgated pursuant to the New Jersey Automobile Reparation Reform Act (No-Fault Act), *N.J.S.A.* 39:6A-1, *et seq.*, requiring a mandatory period of policy renewals as part of the withdrawal process, *Id.* at 552. The Court found a clear legislative intent to minimize the impact of wholesale policy nonrenewals on the market:

> Testimony given during the public hearings which proceeded the passage of the Act dealt on several occasions with questions concerning mass nonrenewals. In particular, several witnesses highlighted *the problems which might ensue should insurance companies withdraw or threaten to withdraw from the State because of alleged inadequacy of rates.* The Legislature must therefore be deemed to have been aware of these problems and to have acted in order to prevent their occurrence. Consequently, there is no warrant to rewrite the clear wording of the Act so as to exempt this particular defendant from its proscription.
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> Moreover, when read as a whole, *the (No-Fault) Act evinces a clear legislative intent that companies which choose to write automobile policies in this State maintain their fair share of coverage.* In the words of Judge Greenberg at the trial level, insureds are to be accorded 'the advantage of guaranteed renewals of indefinite duration with a particular company.' *This intent would by and large be frustrated if we were to rule that carriers can refuse to renew all of their existing policies and yet retain the ability to insure in the future those customers whom they consider desirable. Such an end run around the statutory scheme can not be countenanced. {Sheeran v.*

*Nationwide Mutual Insurance Company, Inc.* 80 *N.J.* 548, 556-557 (1979) (Emphasis added; citations omitted)}.

As with the prior No-fault Act, I find that Section 72 of the FAIR Act also evinces on its face a clear legislative intent to avoid the disruption posed by wholesale policy nonrenewals through implementation of a mechanism for orderly withdrawal from the marketplace. I also find a clear legislative intent in Section 72 to avoid a situation where a withdrawing insurer can pick and choose its business by dumping what it perceives to be unprofitable business on the market and by retaining, or shifting to affiliates, what it perceives to be profitable business. The provisions of the FAIR Act which require the Commissioner to determine whether a company and its affiliates may continue to write other lines of insurance in New Jersey must be considered in this context. My decision to require Twin City and its affiliates to cease writing all other lines of business thus is particularly appropriate, not only for the many reasons noted above, but because it is consistent with the approach of the Supreme Court in *Sheeran*.

6. *Sixth Condition*: At the expiration of each of the respective five year periods during which it must seek replacement coverage for its entire book of business, Twin City shall mail nonrenewal notices to policyholders in the following manner:

a. With regard to automobiles insurance policies, the first notice shall be provided to each policyholder six months prior to the next policy expiration date. The second notice shall be provided in compliance with the requirements of *N.J.A.C.* 11:3-8.2 with regard to time and contents of the notice.

b. With regard to all other insurance policies, notice shall be provided to each policyholder at least 90 days prior to next policy expiration date.

c. To the extent it has not already done so, Twin City shall submit all proposed forms of notices to be sent to policyholders and agents to the Department for review and approval prior to mailing.

*Discussion*: The first private passenger automobile insurance nonrenewal notice to be sent six months prior to the policyholder's next policy expiration date, is necessary to afford the policyholder adequate time to seek replacement insurance from another licensed insurer. The second automobile insurance nonrenewal notice, sent pursuant to *N.J.A.C.* 11:3-8.2, serves as a reminder of the approaching nonrenewal at the policy's expiration date and is in compliance with the pertinent law. The nonrenewal notice for all other policyholders is consistent with current statutes and administrative rules, providing a reasonable measure of consumer protection.

7. *Seventh Condition*: During the period of five years in which Twin City must either obtain replacement carriers or continue to write private passenger automobile insurance, Twin City shall be permitted to avail itself of the nonrenewal provisions contained in *N.J.A.C.* 11:3-8 and *N.J.S.A.* 17:29C-7.1. It may apply for appropriate rate changes, *N.J.S.A.* 17:29A-14. It shall comply with all other appropriate laws as amended by the FAIR Act which are not inconsistent with this Decision and Order, specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatary availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.* 17:33B-11 regarding residual market depopulation quotas and the sharing of profits and losses related to residual market business.

*Discussion*: This requirement is necessary in order to provide for an orderly private passenger automobile insurance market over the next several years, during which time the transition to the market structure contemplated in the FAIR Act will occur. Requiring Twin City to accept it duties and obligations as any other private passenger automobile insurer will facilitate that transition process. Any exemption for Twin City

from these obligations would simply transfer them to other insurers, increasing their burdens and making the period of transition even more difficult.

8. *Eighth Condition*: If a policyholder cancels a policy after receiving the first notice of nonrenewal, Twin City shall be required to refund any unearned premium related to such policy on a pro-rata basis.

*Discussion*: *N.J.S.A.*17:29C-4.1 provides that a policyholder is entitled to receive a "short rate" refund within 60 days after the policyholder initiates the policy cancellation. Since Twin City's Plan proposes to initiate the termination of all policies, all policyholders who cancel their policies should be entitled instead to the benefit of a pro-rata refund within 60 days pursuant to Twin City's rating system which has been filed and approved by the Department.

9. *Ninth Condition*: Within 30 days after this Decision and Order, Twin City shall make the following deposits, or provide equivalent surety bonds, until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. $13.8 million dollars with, and in the name of, the Commissioner for the benefit of all Twin City's New Jersey policyholders, claimants and creditors;

b. $500,000 with, and in the name of, the Commissioner to insure Twin City's performance of the provisions of the Plan, a breach of which shall constitute an immediate forfeiture of the entire deposit; and

c. In lieu of the paragraph 9(a) deposit or surety bond, Twin City may substitute a certified resolution of the Board of Directors of either Twin City's immediate parent, Hartford Fire Insurance Company, or its ultimate parent ITT Hartford Group, Inc., guarantying Twin City's liabilities and potential liabilities.

*Discussion*: To guard against the possibility that Twin City may not have adequate funds on hand to justify its obligations, a deposit or bond to protect Twin City's New Jersey policyholders, claimants and creditors is necessary in the amount of 125% of the estimated reserves for New Jersey losses and loss

adjustment expenses. The $13.8 million deposit represents 125% of Twin City's New Jersey reserve figure, $11 million (Twin City 1989 annual Statement). The $13.8 million deposit represents a conservative approach which I believe is essential and appropriate to safeguard the public interest. Therefore, absent a guaranty from its corporate parent, an amount greater than 100% of reserves is essential to ensure that money will be available to satisfy all of Twin City's obligations, and to avoid a breakdown in coverage for the insured public. To provide a reasonable alternative to Twin City, an appropriate resolution of the Board of Directors guarantying the paragraph 9 (a) liabilities will suffice as a substitute for the deposit or bond and provide the necessary protection for the public in New Jersey.

A $500,000 performance deposit should be sufficient to provide for any penalties which may result from a breach of the provisions of the Plan.

10. *Tenth Condition*: Twin City shall continue to be responsible for discharging its financial obligations to New Jersey funds, associations, boards and agencies without exception, as required by law.

*Discussion*: Twin City will continue doing business in New Jersey during the period of time that the Plan is being implemented. Therefore, it must remain obligated to the State of New Jersey as a condition of doing business similar to all other insurers.

11. *Eleventh Condition*: Twin City shall submit to the Department, upon request, quarterly financial and informational reports of nonrenewal activity, in a form to be specified by the Department, within 45 days after the preceding calendar quarter until the nonrenewal activity is complete.

*Discussion*: This requirement is a necessary condition to provide the Department with a procedure for monitoring Twin City's compliance with the Plan and this Decision and Order.

12. *Twelfth Condition*: Twin City shall submit the following documents to the Department until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. Annual statements on NAIC blanks as prescribed by *N.J.S.A.* 17:23-1. Twin City shall remain subject to examination by the Department as deemed necessary by the Commissioner;

b. Upon the Commissioner's request, NAIC quarterly financial statements and supporting documentation within 45 days after each calendar quarter; and

c. Annual statements of opinion by a qualified actuary relating to loss and loss adjustment expense reserves pursuant to *N.J.A.C.* 11:1-21.

*Discussion*: These conditions are required as the Department must continue its regulatory oversight for as long as necessary to protect the interest of the New Jersey public and to ensure an orderly withdrawal.

NOW THEREFORE, pursuant to the authority granted by *N.J.S.A.* 17:1-8.1, 17:1C-6(e) and 17:33B-30 and all powers expressed or implied therein;

IT IS on this 14th day of August, 1990,

ORDERED that the Plan is hereby approved subject to the following substantial conditions:

1. Twin City's Certificate of Authority shall be amended immediately upon approval of the Plan to limit and restrict its use to the lines of insurance currently underwritten. The Certificate shall be surrendered and Twin City's authority to write insurance in this State shall be terminated when Twin City's New Jersey liabilities and potential liabilities no longer exist.

2. Twin City shall seek, for a period of no more than five years after the date the Plan is approved (the "Commencement Date"), replacement carriers acceptable to the Commissioner for its private passenger automobile insurance business in New Jersey.

3. Upon either placing all of its private passenger automobile insurance business with an acceptable voluntary market replacement carrier or the expiration of five years, whichever is sooner, Twin City may nonrenew its remaining private pas-

senger automobile insurance business in-force as the policies expire.

4. With respect to all of its other business, Twin City shall seek, for a period of no more than five years after the Commencement date, replacement carriers acceptable to the Commissioner. Upon either placing all of its other business with acceptable replacement carriers or the expiration of five years, whichever is sooner, Twin City shall nonrenew its remaining other insurance business in-force as the policies expire. Thereafter, Twin City shall retain only limited authority to continue the servicing and renewal of any life/health policies that are noncancellable by operation of law.

5. All of Twin City's property and casualty affiliates and life and health affiliates shall submit their respective Certificates of Authority for amendment immediately upon approval of Twin City's Plan, so that the Department can limit and restrict the use of each affiliate's Certificate of Authority to the property and casualty and life and health lines of insurance that the affiliate currently writes in New Jersey. Twin City's property and casualty affiliates shall, within 60 days of the Commencement Date, submit to the Commissioner for approval their respective Plans of Orderly Withdrawal, which shall provide that the affiliates shall nonrenew all business in all lines of insurance beginning no later than five years after the Commencement Date as the policies expire. In particular, the Plan of Withdrawal for Hartford Underwriters Insurance Company shall include its homeowners and automobile insurance program for members of the American Association of Retired Persons (AARP). Each affiliate's Plan of Orderly Withdrawal shall provide that its Certificate of Authority shall be indefinitely suspended when its New Jersey liabilities and potential liabilities no longer exist. The affiliates shall retain only limited authority to continue the servicing and renewal of life/health policies which are noncancellable by operation of law.

6. Upon expiration of the respective five year periods during which it must seek replacement coverage for its entire book

of business, Twin City shall mail nonrenewal notices to policyholders in the following timely manner:

a. With regard to private passenger automobile insurance policies, the first notice shall be provided to each policyholder six months prior to the next policy expiration date. The second notice shall be provided in compliance with the time and content requirements of *N.J.A.C.* 11:3-8.2.

b. With regard to all other insurance policies, notice shall be provided to each policyholder at least 90 days prior to the next policy expiration date.

c. Twin City shall submit all notices to be sent to policyholders and agents to the Department for review and approval prior to mailing.

7. During the period of five years after the Commencement Date, Twin City shall be permitted to avail itself of the nonrenewal provisions set forth in *N.J.A.C.* 11:3-8 and *N.J.S.A.* 17:29C-7 and shall be subject to and comply with all other laws which are not inconsistent with this Decision and Order specifically including but not limited to the following:

a. *N.J.S.A.* 17:33B-15 regarding mandatory availability and issuance of automobile insurance coverage;

b. *N.J.S.A.* 17:33B-25 prohibiting an insurer from refusing to issue or renew private passenger automobile insurance;

c. *N.J.S.A.* 17:33B-9 regarding mandatory assignment of producers; and

d. *N.J.S.A.* 17:30E-14 and *N.J.S.A.*17:33B-11 regarding residual market depopulation quotas and the sharing of profits and loses related to residual market business.

8. Twin City shall be required to refund premium on a pro-rata basis to policyholders who cancel their policies after receiving a nonrenewal notice pursuant to this Decision and Order.

9. Twin City shall be required to make the following deposits or provide equivalent surety bonds until such time as

its New Jersey liabilities and potential liabilities no longer exist:

a. $13,800,000 with, and in the name of, the Commissioner for the benefit of all Twin City's New Jersey policyholders, claimants and creditors;

b. $500,000 with, and in the name of, the Commissioner to insure Twin City's performance of the provisions of the Plan, a breach of which shall constitute an immediate forfeiture of the entire deposit; and

c. In lieu of the deposit or surety bond required in paragraph 9 (a) above, a certified resolution of the Board of Directors of either Twin City's immediate or ultimate parent, Hartford Fire Insurance Company or ITT Hartford Group, Inc, respectively, guarantying Twin City's liabilities and potential liabilities may be substituted.

10. Twin City shall continue to be responsible for discharging its financial obligations to New Jersey funds, associations, boards and agencies without exception, as required by law, including the timely payment of residual market equalization charges.

11. Twin City shall submit to the Department, upon request, quarterly financial and informational reports of nonrenewal activity, in a form to be specified by the Department, within 45 days after the preceding calendar quarter until the nonrenewal activity is completed.

12. Twin City shall submit to the Department until such time as its New Jersey liabilities and potential liabilities no longer exist:

a. Annual statements on NAIC blanks as prescribed by *N.J.S.A.*17:23-1. It shall remain subject to examination by the Department as deemed necessary by the Commissioner;

b. Upon the Commissioner's request, NAIC quarterly financial statements and supporting documentation within 45 days after each calendar quarter; and

c. Annual statements of opinion by a qualified actuary relating to loss and loss adjustment expense reserves pursuant to *N.J.A.C.*11:1-21.

13. The terms of this Administrative Decision and Order shall not apply to any life/health policies issued by Twin City and its affiliates, at the time when no further new business will be conducted, which are noncancellable by operation of law.

14. Within 30 days after its receipt of this Decision and Order, Twin City shall apply to the Governing Committee of the Commercial Automobile Insurance Plan ("CAIP") to initiate an expeditious and orderly termination as a CAIP servicing carrier.

To the extent that Twin City believes any of the issues raised by this Decision and Order require a hearing, Twin City may, within 7 days of the date of its receipt of this Decision and Order, submit to the Department a written statement of the reasons why it believes a hearing to be necessary. Thereafter, I will determine whether a hearing should be held on this matter. If no written statement is received from Twin City within the time specified, the terms of this Decision and Order shall automatically become final.

August 14, 1990
Date

/s/ SAMUEL F. FORTUNATO
Samuel F. Fortunato
Commissioner

THE NEW YORK TIMES METROPOLITAN

TUESDAY, AUGUST 21, 1990

# Going Toe-to-Toe Over Car Insurance Bills in New Jersey

By WAYNE KING
Special to The New York Times

TRENTON, Aug. 20—Gov. Jim Florio won a test of wills with one of the nation's insurance giants last week, but the war over who will ultimately pay the bills for the state's $3 billion auto insurance fiasco is certain to be a long one

News Analysis

Governor Florio and his Insurance Commissioner, Samuel Fortunato, sent a message to the insurance industry that it cannot simply walk away from the mess it helped create by dumping millions of drivers into the Joint Underwriting Association, a state-financed insurance pool, while it insures only the best risks.

What the state did was tell ITT Hartford, one of the biggest insurers in the nation, that if it wanted to pull out of the auto insurance business in New Jersey, it would have to give up lucrative business in lines like health and homeowner's policies as well. "If they won't play by the rules," an angry Mr. Florio said, "we won't let them sell us anything."

The Hartford's president and chairman, Donald Frahm, then retreated from the company's announced intention to withdraw from the auto insurance market in the state

The reason was fairly clear: The company's private auto insurance business in the state amounts to $17 million a year, but its total business—including health, life, homeowner and other policies—comes to $308 million

So Mr. Frahm said, "if it is necessary to continue to write automobile insurance in New Jersey in order to keep the rest of its business, Hartford will do so."

But that is by no means the end of it, either for the Hartford or for 32 other auto insurers—including Allstate, which insures 450,000 drivers in the state—who have either petitioned the state to withdraw or otherwise let it be known that they don't want to write auto insurance in the state under its new rules.

ITT Hartford has already been to court to overturn the new rules, unsuccessfully so far, and says it may go back again to gain the right to bail out of the state's auto insurance market. Two other suits are challenging the new rules, one in state court and one in Federal court.

Those new rules, drawn by the Florio administration and passed by the legislature last February in reaction to the financial disaster created by the existing system, are not much different from those of most other states, with one major difference: they require the insurers to pay for at least $1.4 billion of the Joint Underwriting Association's $3 billion deficit under the old system.

## Insuring Poor Risks

State officials acknowledge the old system was poorly designed. But they also say the insurance companies took advantage of it and now want to run away from the mess they were instrumental in creating.

The Joint Underwriting Association was begun in 1984 as a way to insure "poor-risk" drivers who could not get insurance on the commercial market. Instead of being insured by companies like Allstate or Hartford, these drivers were insured by the state. Their premiums went to the state and their claims were paid by the state.

But the insurance companies administered the system. They decided who was put into the state pool, and they settled the claims, deciding how much the state had to pay.

The insurance companies assigned not only the poor-risk drivers to the state pool, but also any driver who appeared to have any risk at all. Paid an 8 percent commission for the policies, the companies made more money, risk free, the more policies they wrote.

The result was that two years ago, 53 percent of the state's drivers were assigned to the high-risk pool.

Millions in Inflated Claims

The insurers also settled the claims brought under the state system, though the state paid the money. The companies received a second fee for settling a claim, and until two years ago, the fee was based on the size of the settlement.

State officials contend that inflated and in some cases fraudulent claims totaled more than $900 million.

The state system was also supposed to be self-sustaining. That is, the premiums paid by the drivers assigned to the system were supposed to be high enough to pay all the claims levied against it.

But because the claims were so high, the premiums rocketed, and, because of political pressures, the state was reluctant to keep increasing them. When the state finally did increase the premiums, the surcharge amounted to about $225, not just for drivers in the pool, but for every driver in the state.

The howls went up, and last February, Governor Florio made good on a campaign promise to scrap the underwriting system, which will begin phasing out in October.

But projections are that the system will end up with a debt of $3 billion, and the new insurance laws require that insurers doing business in the state, through assessments and other devices, will have to pay at least $1.4 billion of that. And the new law bars the companies from passing the costs on to policy holders in the form of higher premiums.

Peter van Aartrijk, a spokesman for the Insurance Information Institute in New York, a nonprofit information service sponsored by casualty insurers, said every state regulates insurers and issues certifications, or licenses, for the various forms of insurance.

All also have regulations regarding withdrawing from an insurance market and canceling or declining to renew existing policies. But, said Mr. van Aartrijk, this seldom becomes a problem except in instances where dramatic changes in the

insurance situation occur, such as in New Jersey, where the law was changed to eliminate the Joint Underwriting Association.

He said that New Jersey's strong stance in refusing to allow insurance companies to leave whenever they want is similar to that adopted by Massachusetts four years ago when its auto insurance industry became unprofitable for some companies and many wanted to withdraw.

Massachusetts also told companies that they must surrender all their insurance business if they insist on withdrawing under conditions that would create "disruption in the marketplace," which is taken to mean that drivers would be left without insurance or with claims that might not be paid.

Companies were allowed to quit doing business in the state, but had to pay assessments, in the millions of dollars, for the right to do so.

For the time being, ITT Hartford says it will stay, but it will not leave the new rules unchallenged.

Early skirmishes in the court have upheld the state's right to lay down the new rules, but the decisions are by no means final.

While the handling of the ITT Hartford challenge makes it clear that the state will not yield easily, Insurance Commissioner Fortunato said that each company will be dealt with individually.

A company that writes only auto insurance here, for example, could not be threatened with loss of its other business if it withdrew from auto insurance. But officials say the state law is strong enough that a company could be forced to continue to operate here unless it provided alternative insurance for its policy holders.

Also, officials here say that one reason it treated the Hartford so firmly was that the company had been peremptory and uncooperative in its attempt to withdraw from the auto market.

"Each future case will be decided on its own merits," Mr. Fortunato said. "But any prudent lawyer or company would review what has transpired up to this point."

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# New Jersey Warns of Ban on Insurer

## Could Lose All Business If It Drops Auto Policies

By WAYNE KING
Special to The New York Times

TRENTON, Aug. 14—State officials told the ITT Hartford Insurance Group today that if one of its subsidiaries wants to cancel its automobile insurance policies in New Jersey, the giant insurer will be barred from doing any business in the state.

The action was the first taken against any of the 32 insurers that have applied to drop their automobile coverage in New Jersey because of laws enacted this year to hold down premiums and eliminate a $3 billion deficit in the Joint Underwriting Association, the State's insurance pool for high-risk driver

In an order delivered by facsimile at noon today, Gov. Jim Florio informed the subsidiary, the Twin City Fire & Casualty Company, that if it canceled its 23,000 auto policies in New Jersey, its parent, ITT Hartford, must also surrender licenses held by nine other subsidiaries to sell homeowner, health and life insurance.

### 'Can't Have It Both Ways'

"If they won't play by the rules, if they won't play fair with our drivers, then they can't have it both ways," Mr. Florio said today. "If they won't sell us car insurance, we won't let them sell us anything."

ITT Hartford collects about $17 million in premiums, about 1 percent of the total private passenger automobile insurance in the state, through the Twin City subsidiary. But it does far more business in other insurance lines like property and casualty and health and life.

Though state officials have no firm figure for the total volume of business all the Hartford subsidiaries do in New Jersey and have asked the company to provide specific dollar volumes, it is estimated that the amount runs "in the hundreds of millions."

The order for the Hartford to surrender all of its certificates of authority, or licenses, to sell any form of insurance was laid down in a lengthy statement by Samuel F. Fortunato, the Insurance Commissioner. It detailed what the company must do if it withdraws from New Jersey's auto insurance market.

Besides surrendering all its licenses, the company must remain in the market for five years, gradually phasing out its auto insurance customers and it must seek replacement coverage for those customers before refusing to renew any policy, the order said.

The commissioner's order also requires the company to post a $13.8 million bond to pay any future liabilities the company may have in the state.

## No Specific Guidelines

Ken Ferraro, a company spokesman, said the Hartford had just received the order and "we're still discussing options."

It was not known what the Hartford would do next, but a New Jersey court has already said that the company must exhaust all administrative remedies before suing.

The strict guidelines for withdrawing from the turbulent New Jersey auto insurance market were issued under the authority of the Fair Auto Insurance Reform law passed in February and made retroactive to Jan. 1.

The law gives the insurance commissioner wide leeway in determining the circumstances under which an insurer can withdraw from New Jersey.

Since the passage of the law and the scrapping of the Joint Underwriting Association, 32 companies have petitioned to stop selling automobile insurance in New Jersey.

Although the state-operated association was intended to insure drivers unable to get insurance on the commercial market, it grew to include more than half the drivers in the state.

That occurred mainly because insurance companies wrote the policies for the program, decided which drivers would be in it and collected an 8 percent fee, state officials have said. The state was responsible for the system and claims against it.

When the system was scrapped this year, it was estimated to have a $3 billion debt, and the Governor's insurance reform law not only made insurance companies responsible for high-risk drivers, but also mandated that they pay a large portion of the debt.

Many said they would rather withdraw from the New Jersey market.

Mr. Fortunato's order today made clear that withdrawal will not be easy.

"Until the department has an opportunity to assess the impact of all withdrawal applications upon the New Jersey market, protection of the public interest requires that companies not be permitted to accomplish quick withdrawals," he said.

## First Withdrawal Rejected

The Commissioner's decision, along with a two-paragraph cover letter, was sent today to Donald R. Frahm, the chairman of ITT Hartford, only hours after the Commissioner executed the order. It is the latest move in a battle that began on March 7 when Twin City returned its auto insurance certificate and notified the state it planned to withdraw from the market.

The state rejected that withdrawal, sent the certificate back and said the company could withdraw only after submitting a Plan of Orderly Withdrawal as required by the new law.

The company immediately began issuing nonrenewal notices on about 3,000 policies, and brought suit to overturn the law. But the courts in several orders stopped the company, saying it must submit a plan first. The courts also said that the company could not sue until it has exhausted its administrative remedies.